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VOLUME 4

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 8

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

No. 23

UNITED STATES, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NO. 8—FILED MAY 20, 1965
NO. 23—FILED SEPTEMBER 15, 1965
PROBABLE JURISDICTION NOTED APRIL 4, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

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[fol. 1541]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

SUPPLEMENTAL COMPLAINT OF INTERVENING PLAINTIFFS, ARIZONA CORPORATION COMMISSION, ET AL.—Filed April 20, 1964

Intervening Plaintiffs, Arizona Corporation Commission, Public Utilities Commission of Colorado, Public Utilities Commission of Idaho, Board of Railroad Commissioners of Montana, Public Service Commission of Nevada, State Corporation Commission of New Mexico, Public Utility Commissioner of Oregon, Public Service Commission of Utah and Washington Utilities and Transportation Com-
[fol. 1542] mission, for supplemental statement of their claim against Defendants, respectfully allege:

I.

On July 5, 1963, these intervening Plaintiffs filed their complaint in intervention.

II.

By Order dated July 8, 1963, the application of these intervening Plaintiffs for leave to intervene was duly granted.

III.

That these intervening Plaintiffs participated in the matters heard by this Court on July 11, 1963 which led to

[File endorsement omitted]

the interlocutory injunction of portions of this proceeding entered on August 3, 1963.

IV.

That on or about July 26, 1963, these intervening Plaintiffs filed with the Interstate Commerce Commission their petition for reconsideration and modification of the Commission's March 21, 1963 Order in its Docket No. 31503.

V.

On January 22, 1964, the Commission served a Supplemental Report and Order dated December 31, 1963, in which it denied the petition of these intervening Plaintiffs, as well as other petitions pending before it, upon grounds which were essentially identical to those relied upon in support of the Commission's March 21, 1963, Order.

VI.

The Commission's order of December 31, 1963, is unlawful for the same reasons as its order of March 21, 1963. Those reasons are set forth in the original complaint of the Plaintiff Mountain-Pacific Railroads and in the original [fol. 1543] complaint in intervention of these intervening Plaintiffs in paragraphs IV through X, inclusive, of said original complaint. Each of these paragraphs is incorporated herein as also applicable to the Supplemental Report and Order of December 31, 1963.

VII.

To the extent that the Commission's Supplemental Report injects any new factual grounds into its reasoning in support of its orders, such grounds are not supported by adequate or substantial evidence, but rest upon assumptions of fact directly contrary to the evidence.

VIII.

On or about March 20, 1964, intervening Plaintiffs stipulated with all other parties to this action for the entry of a Judgment for Interlocutory Injunction based on the supplemental complaint and amended complaints of the principal plaintiffs' and other intervening plaintiffs in this proceeding.

Wherefore, these intervening Plaintiffs pray:

1) That the operation, enforcement and execution of the Order of the Interstate Commerce Commission, dated December 31, 1963, be enjoined pending final hearing and determination of this case.

2) That after full hearing, the operation, enforcement and execution of that Order be perpetually enjoined, set aside, annulled and suspended;

3) That intervening Plaintiffs recover their proper costs; and

4) That the Plaintiffs and intervening Plaintiffs have [fol. 1544] such other and further relief in the premises as in equity may be deemed just and reasonable.

Robert Y. Thornton, Attorney General;

Lloyd G. Hammel, Assistant Attorney General of Oregon, Chief Counsel, PUC;

John F. Weisser, Assistant Attorney General of Oregon, Of Counsel for Intervening Plaintiffs, 103 Public Service Building, Salem, Oregon—97310, Phone—Area Code 503, 364-2171—Ext. 615.

[fol. 1545]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO AMENDED COMPLAINT OF INTERVENING PLAINTIFF, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed April 20, 1964

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, answering the amended complaint of intervening plaintiff, St. Louis-San Francisco Railway Company, respectfully states:

I.

Defendant admits the allegations of paragraph I.

II.

Defendant admits the allegations of the first sentence and the last two sentences of paragraph II. With respect to the remaining sentences of paragraph II, wherein plaintiff attempts to characterize the contents and effect of [fol. 1546] certain reports and orders of the Interstate Commerce Commission, defendant respectfully refers the Court to the aforesaid reports and orders as the best evidence of their contents and effect.

III-IV.

Defendant denies the allegations of paragraphs III and IV.

[File endorsement omitted]

V.

Defendant denies that the amendments to the March 21, 1963 order of the Commission contained in its order of June 20, 1963 are unlawful for lack of 30-day notice or for any other reason. Defendant admits that the Commission, on reconsideration, disagreed with this contention of unlawfulness and that the Commission set forth in its order of December 31, 1963 many of the provisions contained in its order of March 21, 1963, as amended, and provided an effective date of March 30, 1964 for said order of December 31, 1963.

VI.

Defendant denies the allegations of paragraph VI.

VII-VIII.

Defendant admits the allegations of paragraphs VII and VIII.

IX-XII.

Defendant denies the allegations of paragraphs IX through XII.

XIII.

For further answer, defendant denies each and every allegation contained in the amended complaint not herein specifically admitted or otherwise specifically answered, and denies that intervening plaintiff is entitled to the relief prayed for, or any relief whatsoever.

[fol. 1547] Wherefore, defendant prays that said amended complaint be dismissed and that defendant have and recover its costs and such other and further relief as shall be just and equitable.

Dated April 20, 1964.

Raymond K. Merrill, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431, Louis M. Welsh;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1548] Affidavit of Service (omitted in printing).

[fol. 1551]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO SUPPLEMENTAL COMPLAINT OF PLAINTIFFS AND OF INTERVENING PLAINTIFFS, AMADOR CENTRAL RAILROAD COMPANY, ET AL. —Filed April 20, 1964

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the supplemental complaint of plaintiffs and of intervening plaintiffs, Amador Central Railroad Company, et al., respectfully states:

I.

Defendant admits the allegations of paragraph I.

[File endorsement omitted]

II.

Defendant admits the allegations of the first two and last two sentences of paragraph II. With respect to the remaining sentences of paragraph II, wherein plaintiffs and intervening plaintiffs attempt to characterize the contents and effect of certain reports and orders of the Inter-[fol. 1552] state Commerce Commission, defendant respectfully refers the Court to the aforesaid reports and orders as the best evidence of their contents and effect.

III-IV.

Defendant denies the allegations of paragraphs III and IV.

V.

Defendant denies that the amendments to the March 21, 1963 order of the Commission contained in its June 20, 1963 order are unlawful for lack of 30-day notice or for any other reason. Defendant admits that the Commission, on reconsideration, disagreed with plaintiffs' contention concerning the unlawfulness of the amendments and that the Commission set forth in its order of December 31, 1963 many of the provisions contained in the order of March 21, 1963 and that the Commission provided an effective date of March 30, 1964 for its order dated December 31, 1963.

VI.

Defendant denies the allegations of paragraph VI.

VII.

For further answer, defendant denies each and every allegation contained in the supplemental complaint not herein specifically admitted or otherwise specifically answered, and denies that plaintiffs and intervening plaintiffs are entitled to the relief prayed for, or any relief whatsoever.

Wherefore, defendant prays that said supplemental complaint be dismissed and that defendant have and recover [fol. 1553] its costs and have such other and further relief as shall be just and equitable.

Dated April 20, 1964.

Raymond K. Merrill, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431;

Louis M. Welsh, Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1554] Affidavit of Service (omitted in printing).

[fol. 1557]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

STIPULATION OF INTERVENING PLAINTIFF THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY TO ENTRY OF ORDERS GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINTS OF INTERVENING PLAINTIFFS ARIZONA CORPORATION COMMISSION, ET AL., AND OF PEOPLE OF THE STATE OF CALIFORNIA, ET. AL., AND SETTING TIME FOR PLEADING THERETO—Filed April 20, 1964

It Is Hereby Stipulated and Agreed by counsel for intervening plaintiff the Missouri-Kansas-Texas Railroad Company that said intervening plaintiff, having inter-

[File endorsement omitted]

vening plaintiff, having intervened in the above-entitled action subsequent to service upon all other parties of the Stipulation and Order Granting Leave to File Supplemental Complaint of Intervening Plaintiffs Arizona Cor- [fol. 1558] poration Commission, et al., and the Stipulation and Order Granting Leave to File Supplemental Complaint of Intervening Plaintiffs the People of the State of California, et al., the Missouri-Kansas-Texas Railroad Company hereby stipulates and agrees that the Orders therein contained may be made and entered by the above-entitled Court.

Dated: April 17, 1964.

W. A. Thie, M. E. Clinton, John E. McCullough, Dean C. Dunlavey, Gibson, Dunn & Crutcher, By Dean C. Dunlavey, Attorneys for intervening plaintiff the Missouri-Kansas-Texas Railroad Company.

It Is So Ordered.

Dated: April 20, 1964.

E. Avery Crary, Judge.

[fol. 1559]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO COMPLAINT OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, INTERVENING PLAINTIFF—Filed April 22, 1964

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer to the complaint of intervening plaintiff Missouri-Kansas-[fol. 1560] Texas Railroad Company, and say:

I.

These defendants admit paragraphs I and II of said intervener's complaint.

II.

These defendants, in answer to paragraph III of said intervener's complaint, admit paragraphs III, IV, V, VI, VII, X, and XII adopted from the plaintiffs' complaint; deny paragraphs XIV, XVI, XVIII, and XIX adopted from the plaintiffs' complaint; and as to paragraphs VIII and XI adopted from the plaintiffs' complaint, these defendants

[File endorsement omitted]

refer to and incorporate herein paragraphs II and V of their answer to plaintiffs' complaint.

III.

These defendants, in answer to the portion of paragraph IV of said intervener's complaint which adopts paragraph IX of the plaintiffs' complaint, refer to and incorporate herein paragraph III of their answer to the plaintiffs' complaint; and admit that the intervening plaintiff was one of the midwestern lines referred to in said paragraph IV.

IV.

These defendants admit paragraph V of said intervener's complaint.

V.

These defendants deny paragraphs VI and VII of said intervener's complaint.

VI.

These defendants, in answer to paragraph VIII of said intervener's complaint, admit the first, second, and third sentences thereof; deny the fourth and fifth sentences thereof, except to the extent they are in accord with the [fol. 1561] petitions referred to; deny the sixth sentence thereof, except to the extent it is in accord with the Commission's order of December 31, 1963; and deny the last sentence thereof, except they admit that the orders of the Commission referred to, if they become effective, will result in reductions in some of the divisions of intervening plaintiffs Missouri-Kansas-Texas Railroad Company and St. Louis-San Francisco Railway Company.

VII.

These defendants, in answer to paragraph IX of said intervener's complaint, admit the first, second and third

sentences thereof; deny the fourth sentence thereof, except they admit that some of the changes made by the order of December 1, 1963 were minor technical changes in the mechanics of the original order of March 21, 1963; and deny the fifth sentence thereof, except they admit that in many respects the order of December 31, 1963 is essentially identical to the original order of March 21, 1963, as amended on June 20, 1963.

VIII.

These defendants deny paragraphs X and XI of said intervener's complaint.

IX.

Further answering said intervener's complaint, these defendants deny each and every allegation thereof not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said intervener's complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said intervener's complaint be dismissed, and that they have and recover [fol. 1562] their costs and be given such other relief as shall be just and equitable.

Dated April 22, 1964.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suit 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Suite 826, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California;

By Frank R. Johnston, Attorneys for Intervening Defendants Chicago and North Western Railway Company, et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1563] Proof of Service by Mail (omitted in printing).

[fol. 1566]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO SUPPLEMENTAL COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.—Filed April 22, 1964

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad

[File endorsement omitted]

Company and file this their joint and several answer to the supplemental complaint of the People of the State of [fol. 1567] California, et al., and say:

I.

These defendants deny paragraph 1 of said supplemental complaint, and refer to and incorporate herein the Commission's order of December 31, 1963 (Exhibit B to supplemental complaint of plaintiffs, et al.) for a correct statement of the action taken by the Commission with respect to the several petitions for reconsideration and modification.

II.

These defendants deny paragraph 2 of said supplemental complaint, and refer to and incorporate herein the Commission's report and order of December 31, 1963 (Exhibits A, B, and C to supplemental complaint of plaintiffs, et al.) for a correct statement of the reasons given by the Commission for its action with respect to the several petitions for reconsideration and modification.

III.

These defendants, in answer to paragraph 3 of said supplemental complaint, admit the first sentence thereof and deny the second sentence thereof.

IV.

These defendants deny paragraph 4 of said supplemental complaint.

V.

Further answering said supplemental complaint, these defendants deny each and every allegation thereof not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed

for in said supplemental complaint, or any part thereof, or any relief whatsoever.

[fol. 1568] Wherefore, these defendants pray that said supplemental complaint be dismissed, and that they have and recover their costs and be given such other relief in the premises as shall be just and equitable.

Dated April 22, 1964.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330 Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Suite 826 Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California;

By Frank R. Johnston, Attorneys for Intervening Defendants Chicago and North Western Railway Company, et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1569] Proof of Service by Mail (omitted in printing).

[fol. 1572]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO SUPPLEMENTAL COMPLAINT OF ARIZONA CORPORATION COMMISSION, ET AL. —Filed April 22, 1964

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer to the supplemental complaint of plaintiffs and of Arizona Cor-
[fol. 1573] poration Commission, et al., and say:

I.

These defendants admit paragraphs I, II, III, and IV of said supplemental complaint.

II.

These defendants, in answer to paragraph V of said supplemental complaint, deny all of the allegations thereof, except they admit that on January 22, 1964, the Commission served a supplemental report and order dated December 31, 1963. Further answering said paragraph V, these defendants refer to and incorporate herein the Commission's

[File endorsement omitted]

report and order of December 31, 1963 (Exhibits A, B, and C to supplemental complaint of plaintiffs, et al.) for a correct statement of the reasons given by the Commission for its action with respect to the several petitions for reconsideration and modification.

III.

These defendants deny paragraphs VI and VII of said supplemental complaint.

IV.

These defendants admit paragraph VIII of said supplemental complaint.

V.

Further answering said supplemental complaint, these defendants deny each and every allegation thereof not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said supplemental complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said supplemental [fol. 1574] complaint be dismissed, and that they have and recover their costs and be given such other relief in the premises as shall be just and equitable.

Dated April 22, 1964.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Suite 826, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California;

By Frank R. Johnston, Attorneys for Intervening Defendants Chicago and North Western Railway Company, et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1575] Proof of Service by Mail (omitted in printing).

[fol. 1578]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, WILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO SUPPLEMENTAL COMPLAINT OF INTERVENING PLAINTIFFS, ARIZONA CORPORATION COMMISSION, ET AL.—Filed April 24, 1964

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the supplemental complaint of intervening plaintiffs, Arizona Corporation Commission, et al., respectfully states:

[File endorsement omitted]

I-IV.

Defendant admits the allegations of paragraphs I through IV.

V.

Defendant admits that on January 22, 1964, the Interstate Commerce Commission served a supplemental report and order dated December 31, 1963, but respectfully refers the Court to said report and order with respect to the action taken by the Commission and the grounds therefor.

[fol. 1579] VI-VII.

Defendant denies the allegations of paragraphs VI-VII.

VIII.

Defendant admits the allegations of paragraph VIII.

IX.

For further answer, defendant denies each and every allegation contained in the supplemental complaint not herein specifically admitted or otherwise specifically answered, and denies that intervening plaintiffs are entitled to the relief prayed for or any relief whatsoever.

Wherefore, the defendant prays that said supplemental complaint be dismissed and that defendant have and recover its costs and such other and further relief as shall be just and equitable.

Dated April 24, 1964.

Raymond K. Merrill, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd.; Los Angeles 17, California;

Louis M. Welsh, by J. H. C.;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1580] Affidavit of Service (omitted in printing).

[fol. 1583]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO SUPPLEMENTAL COMPLAINT IN INTERVENTION OF ARIZONA CORPORATION COMMISSION, ET AL.—Filed April 24, 1964

The United States of America and the Interstate Commerce Commission, defendants herein, answer the Complaint of the Arizona Corporation Commission, et al., as follows:

I.

Admit the allegations contained in paragraphs I, II, III, IV, and V.

II.

Answering the allegations contained in paragraph VI, which adopts and incorporates by reference paragraphs IV [fol. 1584] through X of the original complaint of said intervening plaintiffs, defendants refer to and incorporate herein as though fully rewritten, paragraphs III, IV and V of the Answer of defendants to said complaint.

III.

Deny the allegations contained in paragraph VII.

IV.

Admit the allegations contained in paragraph VIII.

[File endorsement omitted]

V.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever. Defendants aver that said orders are fully supported and justified by the findings and the evidence and are valid in all respects.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1587]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO SUPPLEMENTAL COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.—Filed April 24, 1964

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the supplemental complaint of intervening plaintiffs, People of the State of California, et al., respectfully states:

I-II.

Defendant denies the allegations of paragraphs 1 and 2, and respectfully refers the Court to the report and order of the Interstate Commerce Commission dated December 31, 1963 for a correct statement of the action of the Commission and the reasons therefor.

[fol. 1588]

III.

Defendant admits the allegations of the first sentence of paragraph 3 and denies the allegations of the second sentence thereof.

IV.

Defendant denies the allegations of paragraph 4.

[File endorsement omitted]

V.

For further answer, defendant denies each and every allegation contained in the supplemental complaint not herein specifically admitted or otherwise specifically answered, and denies that intervening plaintiff is entitled to the relief prayed for or any relief whatsoever.

Wherefore, defendant prays that said supplemental complaint be dismissed and that said defendant have and recover its costs and such other and further relief as shall be just and equitable.

Dated April 24, 1964.

Raymond K. Merrill, 888 Union Station, 516 W. Jackson Blv., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431;

Louis M. Welsh, by J. H. C.;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1589] Affidavit of Service (omitted in printing).

[fol. 1592]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY TO COMPLAINT OF INTERVENING PLAINTIFF, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—Filed April 24, 1964

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the complaint of intervening plaintiff, Missouri-Kansas-Texas Railroad Company, respectfully states:

I-II.

Defendant admits the allegations of paragraphs I and II.

III.

Defendant admits the allegations of paragraph III through VII, X and XII, adopted by reference from the complaint of plaintiffs, and denies the allegations of [fol. 1593] paragraphs XIV, XVI, XVIII and XIX thereof. Defendant refers to and incorporates herein its answer to paragraphs VIII and XI adopted from plaintiff's complaint, contained in paragraph II and IV of defendant's said answer.

IV-V.

Defendant admits the allegations of paragraphs IV and V.

[File endorsement omitted]

VI-VII.

Defendant denies the allegations of paragraphs VI and VII.

VIII.

Defendant admits, as alleged in paragraph VIII, that intervening plaintiffs, Missouri-Kansas-Texas Railroad Company and St. Louis-San Francisco Railway Company filed with the Commission the documents as stated and that the Commission issued an order ruling on the various petitions submitted by intervening plaintiffs, to which order the defendant respectfully refers the Court for a true and correct statement of its contents. Defendant denies the statements in the aforesaid petitions and the last sentence of paragraph VIII, relating to the alleged losses to be sustained by intervening plaintiffs.

IX.

Defendant admits the allegations of the first three sentences of paragraph IX. Defendant respectfully refers the Court to the Commission's report and order dated December 31, 1963 for a correct statement of the contents and effect thereof.

[fol. 1594] X-XI.

Defendant denies the allegations of paragraphs X and XI.

XII.

For further answer, defendant denies each and every allegation contained in the complaint not herein specifically admitted or otherwise specifically answered and denies that intervening plaintiff is entitled to the relief prayed for or any relief whatsoever.

Wherefore, defendant prays that said complaint be dismissed and that defendant have and recover its costs and such other and further relief as shall be just and equitable.

Dated April 24, 1964.

Raymond K. Merrill, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431;

Louis M. Welsh, by J. H. C.;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1595] Affidavit of Service (omitted in printing).

[fol. 1598]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER FIXING TIME FOR ORAL ARGUMENT, SUBMISSION OF PROPOSED FINDINGS AND JUDGMENT AND ISSUES OF FACT AND LAW REMAINING IN CONTROVERSY—August 27, 1964

Oral argument in the above matter will be had on November 19, 1964, at 10 a.m., in the United States Court of Appeals courtroom on the 16th floor of the United States

[File endorsement omitted]

Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California. If more than one day is needed to complete arguments, November 20th, or such part thereof as may be required, will be devoted to oral argument.

Counsel for plaintiffs and intervening plaintiffs are requested to serve and file proposed Findings of Fact, Conclusions of Law and Judgment, and counsel for defendants and intervening defendants are requested to file proposed Findings of Fact, Conclusions of Law and Judgment. Said proposed Findings and Judgments shall be served and filed with the court by both sides not later than October 23, 1964.

The parties are requested to file with the court by Oc-
[fol. 1599] tober 23, 1964, a list of issues of fact and issues of law remaining in controversy.

Dated: August 27, 1964.

E. Avery Crary, United States District Judge.

[fol. 1600]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

LIST OF ISSUES REMAINING IN CONTROVERSY
—Filed October 22, 1964

In accordance with the Order of the Court dated August 27, 1964, the plaintiffs, intervening plaintiffs, defendants, and intervening defendants submit the list of issues remaining in controversy hereinafter set forth.

[File endorsement omitted]

[fol. 1601] Issues of Fact

This case is being heard upon the certified record of the proceedings before the Interstate Commerce Commission without the taking of additional evidence by the Court; and (apart from such factual matters as may be involved in the issues stated below) there are no issues of fact to be litigated.

Issues Remaining in Controversy

The following issues, and no others, remain to be litigated:

The parties do not agree on the proper statement of issue No. 1.

Plaintiffs state the issue as follows ("Plaintiffs," as used herein, includes intervening plaintiffs):

1. A. Whether that portion of Section 15(6) which provides that the Commission must give due consideration to the "amount of revenue required to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation" means the dollar amount of revenue required; if so, whether the dollar amount of revenue required by the participating carriers was a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission made findings upon such issue?

[fol. 1602] B. If that portion of Section 15(6) which provides that the Commission must give due consideration to the "amount of revenue required" does not mean the dollar amount of revenue required, whether that Section nonetheless does provide for consideration of the "amount of revenue required" in some rational form; if so, whether the "amount of revenue required," by the participating carriers, so defined, was a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission stated findings and con-

clusions, as well as the reasons or basis therefor, upon such issue?

Defendants state the issue as follows ("Defendants," as used herein, includes intervening defendants):

1. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission, in administering the revenue provision of Section 15(6) of the Interstate Commerce Act, to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to the amounts of revenue required by the participating carrier groups to pay their respective operating expenses, taxes, and a fair return on their property held for and used in the service of transportation?

The parties do not agree on the proper statement of issue No. 2.

Plaintiffs state the issue as follows:

[fol. 1603] 2. Whether the Commission was required by Section 15(6) of the Interstate Commerce Act to give due consideration to the justice, reasonableness and equity of the divisions being prescribed in light of the amounts of revenue required by the participating carriers to pay their respective operating expenses, taxes, and a fair return on their railway properties held for and used in the service of transportation, and, if so, whether the Commission gave the required due consideration?

Defendants state the issue as follows:

2. Whether, in prescribing the divisions fixed by its orders, the Commission gave due consideration to the amounts of revenue required by the participating carrier groups to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation?

The parties do not agree on the proper statement of issue No. 3.

Plaintiffs state the issue as follows:

3. Whether the financial effect upon the participating carriers of the divisions being prescribed, and the extent to which such divisions provide the amounts of revenue required by such carriers, were material issues within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, [fol. 1604] upon such issues?

Defendants state the issue as follows:

3. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission, in administering the revenue provision in Section 15(6) of the Interstate Commerce Act, to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to the financial effect of the divisions being prescribed upon the participating carrier groups?

4. Whether the Commission was required by Section 15(6) of the Interstate Commerce Act to give consideration to the financial effect upon the participating carriers of the divisions being prescribed; and, if so, whether the Commission gave due consideration thereto?

The parties do not agree on a proper statement of issue No. 5.

Plaintiffs state the issue as follows:

5. A. Whether the amount of revenue required by individual carriers, the financial effect upon individual carriers of the divisions being prescribed, and the extent to which the divisions being prescribed provide the amounts of revenue required by individual carriers, were material issues within the meaning of Section 8(b) of the Adminis- [fol. 1605] trative Procedure Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issues?

B. Whether the Commission was required by Section 15(6) to give consideration to the justice, reasonableness

and equity of the divisions being prescribed in light of the amounts of revenue required by the individual carriers, and to the financial effect upon the individual carriers of the divisions being prescribed; and, if so, whether the Commission gave due consideration thereto.

C. If the answer to either A or B above is yes, whether the Denver & Rio Grande Western Railroad waived its right to such findings or consideration in the proceedings before the Commission, or is otherwise prevented from complaining in that regard in this Court, by joining with other Mountain-Pacific railroads in stating before the Commission that the pleadings did not bring into issue the lawfulness of divisions over Utah gateways or subdivisions within Mountain-Pacific Territory?

Defendants state the issue as follows:

5. A. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission, in administering the revenue provision in Section 15(6) of the Interstate Commerce Act, to find and state in its reports the financial effect of the divisions being prescribed upon each of the individual participating [fol. 1606] carriers?

B. Whether, in prescribing the divisions fixed by its orders, the Commission was required by Section 15(6) of the Interstate Commerce Act to give due consideration to the amounts of revenue required by each of the individual participating carriers and to the financial effect of the divisions being prescribed upon such individual carriers; and, if so, whether the Commission gave such consideration?

C. If the answer to either A or B above is yes, whether the Denver & Rio Grande Western Railroad waived its right to such findings or consideration in the proceedings before the Commission, or is otherwise prevented from complaining in that regard in this Court, by reason of its having joined with other Mountain-Pacific railroads in

stating before the Commission that the pleadings did not bring into issue the lawfulness of divisions over the Utah gateways or of subdivisions within Mountain-Pacific Territory, and in opposing the prescription of subdivisions for carriers in said Territory?

The parties do not agree on the proper statement of issue No. 6.

Plaintiffs state the issue as follows:

6. Whether the justice, reasonableness and equity of particular percentage divisions prescribed by the Commission, in relation to the standards specified and embraced [fol. 1607] in Section 15(6) of the Interstate Commerce Act, were material issues within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission's failure to state findings and conclusions, as well as the reasons or basis therefor, with respect to any of these percentages (except the 15 percent minimum) violated Section 8(b)?

Defendants state the issue as follows:

6. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to the justness, reasonableness and equity, in relation to the standards specified and embraced in Section 15(6) of the Interstate Commerce Act, of the particular percentage divisions prescribed by the Commission, and particularly whether the Commission was required thereby to relate each particular percentage division prescribed by it to said standards?

7. Whether the findings of the Commission with respect to a minimum division of 15 percent are supported by substantial evidence within the meaning of Section 10(c) of the Administrative Procedure Act?

The parties do not agree on the proper statement of issue No. 8.

Plaintiffs state the issue as follows:

[fol. 1608] 8. A. Whether the record contained evidence which was typical in character and ample in quantity to support the Commission's prescription of divisions of Transcontinental rates (a) between points in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Peoria and St. Louis, and (b) between points in Group E-5 (Southeastern Illinois) in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Chicago?

B. Whether the Commission "could reasonably deem" a record to contain typical evidence if that record did not in fact contain such evidence.

C. Whether the claim of the Missouri-Kansas-Texas Railroad and the St. Louis-San Francisco Railway that the record did not contain evidence typical in character and ample in quantity to support the Commission's prescription of divisions over routes embracing their respective lines may be raised in this Court; and, if so, whether the record contained such evidence?

Defendants state the issue as follows:

8. A. Whether the record contained evidence which the Commission could reasonably deem typical in character and ample in quantity to support the Commission's prescription of divisions of Transcontinental rates (a) between points in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Peoria and St. Louis; and (b) between points in Group E-5 (Southeastern Illinois) in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Chicago?

[fol. 1609] B. Whether the claim of the Missouri-Kansas-Texas Railroad and the St. Louis-San Francisco Railway that the record did not contain evidence typical in character and ample in quantity to support the Commission's prescription of divisions over routes embracing their respective lines may be raised in this Court, in view of the

fact said carriers did not present such claim to the Commission by petition for reconsideration, or otherwise, and of their representations to the contrary to the Commission; and, if so, whether the record contained such evidence?

The parties do not agree on the proper statement of issue No. 9.

Plaintiffs state the issue as follows:

9. Whether in prescribing divisional scales which will determine the allowance, if any, to be made for terminal service, the terminal costs incurred by participating railroads are material issues within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issues?

Defendants state the issue as follows:

9. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required [fol. 1610] the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to what plaintiffs refer to as "the allowance, if any, to be made for terminal service," or with respect to the terminal costs incurred by the participating railroads for which divisional scales were prescribed.

The parties do not agree on the proper statement of issue No. 10.

Plaintiffs state the issue as follows:

10. Whether the divisional scales prescribed by the Commission for calculation of divisions as between the Midwestern and Mountain-Pacific railroads contain terminal and intermediate factors which affect the divisions produced by those scales; if so, whether the relationships between such terminal and intermediate factors and the standards specified and embraced in Section 15(6) of the Interstate Commerce Act were material issues within the meaning of Section 8(b) of the Administrative Procedure

Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issues?

Defendants state the issue as follows:

10. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, [fol. 1611] with respect to what the plaintiffs refer to as "terminal and intermediate factors which affect the divisions produced by those scales," or with respect to what the plaintiffs refer to as "the relationships between such terminal and intermediate factors and the standards specified and embraced in Section 15(6) of the Interstate Commerce Act"?

The parties do not agree on the proper statement of issue No. 11.

Plaintiffs state the issue as follows:

11. Whether the relationships between the factors in the divisional scales prescribed by the Commission and the standards specified and embraced in Section 15(6) of the Interstate Commerce Act were material issues within the meaning of Section 8(b) of the Administrative Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issues?

Defendants state the issue as follows:

11. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to what the plaintiffs refer to as "the relationships between the factors in the divisional scales prescribed by the Commission and the standards specified and embraced in Section 15(6) of the Interstate Commerce Act"?

[fol. 1612] 12. Whether the Commission's statement with respect to changes that have taken place since 1934 in the Midwestern railroads' proportion of "overhead" service is supported by substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act?

The parties do not agree upon the proper statement of issue No. 13.

Plaintiffs state the issue as follows:

13. Whether the controversy over the efficiency with which the respective carriers are operated presented a material issue within the meaning of Section 8(b) of the Administrative Procedure Act which may be raised in this Court by the Missouri-Kansas-Texas Railroad Co. and the St. Louis-San Francisco Railway Co.; and, if so, whether the Commission stated the reasons or basis for its conclusion upon this issue.

Defendants state the issue as follows:

13. Whether the claim made by the Missouri-Kansas-Texas Railroad and the St. Louis-San Francisco Railway that the Commission failed to make sufficient findings with respect to efficiency of operations may be raised in this Court, in view of the fact said carriers did not present such claim to the Commission by petition for reconsideration, or otherwise, and of their representations to the contrary to the Commission; and, if so, whether the first clause in the last sentence of Section 8(b) of the Administrative [fol. 1613] Procedure Act required the Commission, in administering Section 15(6) of the Interstate Commerce Act, to state in its reports any findings, conclusions, bases or reasons beyond those stated therein with respect to efficiency of operations?

The Parties do not agree on the proper statement of issue No. 14.

Plaintiffs state the issue as follows:

14. Whether the Commission's recital of facts other than those which eliminate passenger deficits satisfied its duty

under Section 15(6) of the Interstate Commerce Act to give due consideration to "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation," where it stated such conclusions as it did on the general relativity of revenue needs in terms which eliminated needs represented by passenger deficits?

Defendants state the issue as follows:

14. Whether the Commission reached its conclusions on revenue needs solely on the basis of facts which eliminated passenger deficits?

The parties do not agree on the proper statement of issue No. 15.

Plaintiffs state the issue as follows:

[fol. 1614] 15. Whether the Commission satisfied its duty under Section 15(6) of the Interstate Commerce Act to give due consideration to "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation," where it relied, either solely or in substantial part, upon facts showing the income of groups of railroads from freight service in dealing with the issue of relative revenue needs without considering or finding the railway property held for and used in freight transportation service by the said groups of railroads, and without considering or finding the fairness of return on freight property represented by the freight earnings upon which it relied?

Defendants state the issue as follows:

15. Whether, in considering revenue needs, the Commission was prohibited by law from considering the evidence relating to freight net railway operating income and passenger deficits, along with other pertinent facts, including net railway operating income and rate of return from overall railway operations, without considering, also, the value

of railway property held for and used in freight transportation service?

The parties do not agree on the proper statement of issue No. 16.

Plaintiffs state the issue as follows:

[fol. 1615] 16. Whether the Commission's reliance upon freight net railway operating income, thus eliminating passenger deficits, pertained to a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issue?

Defendants state the issue as follows:

16. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to its consideration of the evidence relating to freight net railway operating income and passenger deficits, along with other pertinent facts?

The parties do not agree on the proper statement of issue No. 17.

Plaintiffs state the issue as follows:

17. Whether the Commission's reliance upon figures which eliminate revenue needs represented by passenger deficits, in the absence of evidence showing how much, if any, of the passenger deficits of the respective carriers could be saved and how much must be borne in any event by freight service, was arbitrary or without support in substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act?

[fol. 1616] Defendants state the issue as follows:

17. Whether figures relating to passenger deficits can be said, as a matter of law, to be entitled to no consideration in the absence of a separation of passenger expenses between those solely related to passenger service and the

common expenses which are apportioned as between passenger and freight services, or whether this was an administrative matter for the Commission's sole determination?

The parties do not agree on the proper statement of issue No. 18.

Plaintiffs state the issue as follows:

18. A. Whether the Commission denied a full and fair hearing to plaintiffs and intervening plaintiffs when it denied them an opportunity to prove that the passenger deficits of the Mountain-Pacific railroads were not unduly high, that no savings could be made in their passenger operations, and that consideration of the public interest would not permit curtailment of passenger service, where, after the record was closed, a revenue needs theory was invoked which necessarily raised those factual issues and the record contained no evidence by which these issues could be determined?

B. Whether, if the Commission did deny plaintiffs and intervening plaintiffs a full and fair hearing with respect to this matter, said parties waived their right to complain of that denial in this cause, even though they undertook [fol. 1617] to maintain their claim in petitions for reconsideration, by reason of the fact that they did not also embrace the claim in a petition for further hearing before the Commission?

C. Whether, in any event, the right of plaintiffs and intervening plaintiffs to a full and fair hearing can be held to have been waived in the absence of any findings to that effect in the Commission's reports?

Defendants state the issue as follows:

18. Whether the claim of the plaintiffs and intervening plaintiffs that the Commission denied them a full and fair hearing in its consideration of freight net railway operating income and passenger deficits may be litigated in this

Court; and, if so, whether the Commission denied them a full and fair hearing in that regard?

The parties do not agree on the proper statement of issue No. 19.

Plaintiff state the issue as follows:

19. Whether plaintiffs' and intervening plaintiffs' claim that differences in requirements for investment funds for equipment and facilities commensurate with industrial development in the territories served by the respective carriers should be considered in determining revenue needs was a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the [fol. 1618] Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issue?

Defendants state the issue as follows:

19. Whether the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act required the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, in disposing of the plaintiffs' contention that the Mountain-Pacific lines had greater revenue needs than the other carrier groups because of the alleged greater requirements within Mountain-Pacific Territory for investment funds for enlarged facilities commensurate with the industrial development in said territory?

The parties do not agree on the proper statement of issue No. 20.

Plaintiffs state the issue as follows:

20. Whether the Commission's use of aggregate costs of railroad groups in comparison with aggregate revenues by railroad groups as the basis for its determination of cost of service raised a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the Commission stated the reasons or basis for its conclusion upon such issue?

Defendants state the issue as follows:

[fol. 1619] 20. Whether the first clause in the last sentence in Section 8(b) of the Administrative Procedure Act required the Commission, in using by railroad groups the aggregate costs produced by its restatement of the plaintiffs' cost study in comparisons with aggregate revenues by railroad groups produced by the involved divisions as a basis for its findings on the relation of the cost proportions of the carrier groups to their revenue proportions produced by devisions on the involved traffic, in lieu of making such comparisons on the basis used by plaintiffs, namely, aggregates of shipment-by-shipment constructive revenues based on cost, to state the reasons or basis for so using such aggregate costs; and, if so, whether the Commission complied with said requirement?

The parties do not agree on the proper statement of issue No. 21.

Plaintiffs state the issue as follows:

21. A. Whether the Eastern and the Midwestern railroads were under legal obligation to come forward with data pertinent to empty return ratios comparable to those provided by the Mountain-Pacific railroads for operations within their territory?

B. If the answer to A is yes, whether the Eastern and Midwestern railroads did come forward with data showing their empty return ratios comparable to those provided by the Mountain-Pacific railroads for operations within their territory?

[fol. 1620] C. If the answer to B is yes, whether the Commission may lawfully reject the data provided by the Mountain-Pacific railroads on the ground that comparable data for the Eastern and Midwestern railroads were not available?

Defendants state the issue as follows:

21. Whether the Eastern or the Midwestern lines were under legal obligation to come forward with data pertinent to empty return ratios in addition to those which they did provide for the record?

22. Whether, in determining, for various reasons and in reliance on various grounds stated in its reports, to use Rail Form A railroad group average empty car return ratios in its restatement of plaintiffs' cost study (in lieu of the empty car return ratios relied upon by plaintiffs), the Commission relied in any substantial part upon its statement that its power to order the Eastern and Midwestern railroads to produce additional facts in their possession "is not clear"; and, if the Commission did so rely, whether the Commission had such power under Section 20(1) of the Interstate Commerce Act; and, if the Commission did have such power, whether its uncertainty in regard thereto constitutes, in the circumstances of this case, a valid ground for setting aside Commission action?

The parties do not agree on the proper statement of issue No. 23.

[fol. 1621] Plaintiffs state the issue as follows:

23. Whether the Commission could lawfully reject the evidence of empty return ratios brought forward by the Mountain-Pacific railroads because of the absence of comparable evidence with respect to the empty return ratios of the Eastern and Midwestern railroads where the latter evidence was in the sole possession of those railroads, where none of those railroads came forward with the comparable evidence required, and where the Commission made no effort to compel production of such evidence. (The Commission expressly ruled upon this issue at page 5 of its supplemental report (PR 112) and plaintiffs argued in support of this claim in their opening brief beginning at page 93, line 26.)

Defendants state the issue as follows:

23. A. Whether the Commission, in the restatement of the plaintiffs' cost study, in which it used Rail Form A railroad group average empty car return ratios and refused on grounds stated in its reports to give any weight to the evidence of empty car return ratios brought forward by the plaintiffs, committed an arbitrary abuse of discre-

tion in so refusing to give any weight to said evidence of the plaintiffs?

B. This issue, as phrased above by plaintiffs, was not covered in the briefs of defendants because it does not appear to have been raised in the brief of the plaintiffs in the form or in the sense of the plaintiffs' statement above. Nevertheless, defendants raise no question as to the right of [fol. 1622] the plaintiffs to present the issue, even though the time alloted for oral argument may not permit defendants to present a full development of the views they would have expressed if the issue as phrased above had been known to the defendants at the time they wrote their own briefs.

24. Whether the Commission's use of Rail Form A railroad group average box car empty return ratios (which average was weighted according to the car miles each kind of box car experienced in the entire operation of each railroad group) in determining cost of service in its restatement of plaintiffs' cost study was arbitrary or without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act with respect to traffic moving in special purpose box cars?

The parties do not agree on the proper statement of issue No. 25.

Plaintiffs state the issue as follows:

25. Whether, in supporting its use of Rail Form A railroad group average out-of-pocket maintenance of way costs in its determination of cost of service, the Commission relied in any substantial part upon a finding that transcontinental traffic moves over the various categories of lines of the Midwestern railroads in the same degree as the average of all traffic; and, if so, whether such finding was arbitrary or without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act; and, if said finding was arbitrary [fol. 1623] and without the support of substantial evidence,

whether that constitutes, in the circumstances of this case, a valid ground for setting aside Commission action?

Defendants state the issue as follows:

25. Whether, in determining, for various reasons and in reliance on various grounds stated in its reports, to use Rail Form A railroad group average out-of-pocket maintenance of way costs in its restatement of the plaintiffs' cost study (in lieu of the plaintiffs' average territorial costs calculated upon a formula which involved the use of a constant cost on the basis of the United States average per mile of track imputed to all of the participating railroad groups), the Commission relied in any substantial part upon a finding that transcontinental traffic moves over the various categories of lines of the Midwestern railroads in the same degree as the average of all traffic; and, if the Commission did so rely, whether such finding was arbitrary or without the support of substantial evidence; and, if said finding was arbitrary and without the support of substantial evidence, whether that constitutes, in the circumstances of this case, a valid ground for setting aside Commission action?

The parties do not agree on the proper statement of issue No. 26.

Plaintiffs state the issue as follows:

[fol. 1624] 26. Whether, in using Rail Form A railroad group average locomotive and car costs in its determination of cost of service, the Commission relied in any substantial part upon the relative size of engine districts in the East and in the West; and, if so, (a) whether the Commission's finding as to the relative size of such engine districts is without support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act; and (b) whether the Commission's assumption that the relative size of engine districts is relevant in determining locomotive and car costs was arbitrary and without support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act;

and, if said finding and assumption were arbitrary and without the support of substantial evidence, does that constitute, in the circumstances of this case, a valid ground for setting aside Commission action?

Defendants state the issue as follows:

26. Whether, in determining, for various reasons and in reliance on various grounds stated in its reports, to use Rail Form A railroad group average locomotive and car costs in its restatement of plaintiffs' cost study (in lieu of the locomotive costs used by plaintiffs which were the average costs per locomotive mile for all railroads in the United States, excluding those in the Southern Region, imputed by plaintiffs to each of participating railroad groups, and in lieu of the car costs used in the plaintiffs' cost studies which were the average costs of Midwestern railroads, imputed by the plaintiffs to the other partici- [fol. 1625] pating railroad groups), the Commission relied in any substantial part upon the relative size of engine districts in the East and in the West; and, if the Commission did so rely, (a) whether the Commission's finding as to the relative size of such engine districts is without support of substantial evidence, and (b) whether the Commission's assumption that the relative size of engine districts is relevant in determining locomotive and car costs was arbitrary and without the support of substantial evidence; and, if said finding and assumption were arbitrary and without the support of substantial evidence, does that constitute, in the circumstances of this case, a valid ground for setting aside Commission action?

The parties do not agree on the proper statement of issue No. 27.

Plaintiffs state the issue as follows:

27. Whether the Commission's use of Rail Form A railroad group average empty return ratios for refrigerator cars in its determination of cost of service raised a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether the

Commission's recital of the contentions of the parties constituted findings and conclusions, as well as the reasons or basis therefor, upon such issue?

Defendants state the issue as follows:

27. Whether, the first clause in the last sentence in [fol. 1626] Section 8(d) of the Administrative Procedure Act required the Commission, in using Rail Form A railroad group empty return ratios for refrigerator cars in its restatement of the plaintiffs' cost study (in lieu of accepting the empty return ratios claimed by plaintiffs based on studies of movements of the refrigerator cars of four ownerships, i.e., Pacific Fruit Express Co., Western Fruit Express Co., Santa Fe Refrigerator Dispatch and Northern Pacific Railway Co., which study of plaintiffs excluded refrigerator cars of all other ownerships), to state findings and conclusions, as well as the reasons or basis therefor, in its reports with respect to such use; and, if so, whether the Commission complied with said requirement?

The parties do not agree on the proper statement of issue No. 28.

Plaintiffs state the issue as follows:

28. Whether the standard for measuring the cost element related to the property base of the carriers in a divisions proceeding was a material issue within the meaning of Section 8(b) of the Administrative Procedure Act; and, if so, whether, in using the "Elements of Value" formula in its determination of cost of service, the Commission stated findings and conclusions, as well as the reasons or basis therefor, upon such issue?

Defendants state the issue as follows:

28. Whether the first clause in the last sentence in Section 8(b) of the Administrative Procedure Act required the [fol. 1627] Commission, in using in its restatement of the plaintiffs' cost study the "Elements of Value" base in computing return by railroad groups on the railway property held for and used in the service of transportation (in lieu of using the aggregates of the net book investments in

such property recorded on the books of the individual railroads in each such group), to state in its reports findings and conclusions with respect to such use, as well as the reasons or basis therefor; and, if so, whether the Commission complied with said requirement?

29. Whether, assuming arguendo that the data in the Mountain-Pacific railroads' cost study were lawfully rejected, the Commission's use in its restatement of Rail Form A railroad group costs and cost factors which are here challenged by plaintiffs—empty car return ratios, maintenance of way and structure costs, locomotive costs, car costs and property base—constituted action which was supported by findings and substantial evidence within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act?

30. Whether, if the Commission is found to have erred with respect to any matters in Issues Nos. 9, 10, 11, 12, 16, 20, 22, 24, 25, 26, 28, or 29, *supra,* such errors were prejudicial within the meaning of Section 10(e) of the Administrative Procedure Act, and other than *de minimis?*

[fol. 1628] Dated: October 21, 1964.

Respectfully submitted,

O'Melveny & Myers, Pierce Works, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles, California 90013;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago, Illinois 60603;

By Warren M. Christopher, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.

Gibson, Dunn & Crutcher, Dean C, Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101;

By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

W. A. Thie, Barrett Building, Denison, Texas;

M. E. Clinton, 204 M-K-T Building, 701 Commerce Street, Dallas, Texas 75202;

[fol. 1629] John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101;

By Dean C. Dunlavey, Attorneys for Intervening Plaintiff Missouri-Kansas-Texas Railroad Company.

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco, California;

By C. M. Saroyan, by H. J. T., Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California.

Robert Y. Thornton, Lloyd G. Hammell, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, 336 E. Hillcrest, Suite 519, Inglewood, California;

By Joseph Besnah, by H. J. T., Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.

Thomas R. Sheridan, United States Attorney, United States Post Office and Courthouse, Los Angeles, California 90012, by James R. Dooley, Attorney for Defendants The United States of America and Interstate Commerce Commission.

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia, Pa.;

[fol. 1630] Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California;

By James W. Baldwin, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago, Illinois 60603;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago, Illinois 60602;

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago, Illinois 60606;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles, California 90017;

By Frank R. Johnston, Attorneys for Intervening Defendants Chicago & North Western Railway Co., et al.

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago, Illinois 60606;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles, California 90017;

By Joe Cummins, Attorneys for Intervening Defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[fol. 1631]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER EXTENDING TIME FOR FILING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT—October 22, 1964

The above captioned matter came on regularly for hearing on October 22, 1964 in the above entitled court, before the Honorable E. Avery Crary, Judge Presiding, upon the Motion For Extension Of Time For Filing Proposed Findings Of Fact And Conclusions Of Law And Judgment filed by defendants United States of America and Interstate Commerce Commission; and the Court having considered said Motion, the Affidavit of Arthur J. Cerra in support thereof, together with all the records and files herein, and the Court having heard the arguments of counsel and being fully advised in the premises;

Now Therefore It Is Ordered, pursuant to Rule 6(b)(1), Federal Rules of Civil Procedure, that the time for all parties to serve and file proposed Findings of Fact, Con-
[fol. 1632] clusions of Law and Judgment, which are now required by order of this Court to be served and filed not

[File endorsement omitted]

later than October 23, 1964, be, and the same is hereby extended to and including November 2, 1964.

Dated: This 22 day of October, 1964.

E. Avery Crary, United States District Judge.

[fol. 1633] Certificate of Service by Mail (omitted in printing).

[fol. 1634]

[Stamp—Lodged—Nov 2 1964—Clerk, U. S. District Court —Southern District of California—By Edward Maldonado]

[Handwritten notation—Rule 7 waived as to Judgment being attached to Finding 11/2/64—EAC]

[fol. 1635]

IN THE UNITED STATE, DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al., Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT PROPOSED BY DEFENDANTS AND INTERVENING DEFENDANTS —Lodged November 2, 1964

This cause having come on for final hearing on November ....., 1964, on the pleadings in this Court and a certified copy of the record before the Interstate Commerce Commission; and the Court having heard the oral argument and considered the briefs submitted by counsel, and

being fully advised in the premises, now makes and files its written Findings of Fact, Conclusions of Law, and Judgment, as follows:

Findings of Fact*

General Nature of this Action

1. This is an action to enjoin and set aside three orders of the Interstate Commerce Commission (the Commission) [fol. 1636] which prescribe divisions of joint rates on interstate shipments of freight traffic (1) between points in Official Territory and points in Transcontinental Territory, including Montana, and (2) between points in Midwestern Territory and points in Transcontinental Territory, including Montana. Official Territory (also known as Eastern Territory) is generally the section of the country east of Lake Michigan, Chicago and Peoria, Ill., St. Louis, Mo., and Cairo, Ill. Transcontinental Territory lies generally west of El Paso, Texas, Albuquerque, New Mexico, Ogden, Utah, Boise, Idaho, and the western border of Montana, and is the western part of the larger territory known as Mountain-Pacific Territory, which includes generally all of the eleven Mountain-Pacific states except the southeastern corner of Wyoming and the eastern sections of Colorado and New Mexico. Midwestern Territory is generally the section of the country between Official Territory and points on the Mississippi River south of Cairo, Illinois, on the one hand, and Mountain-Pacific Territory, on the other hand, and includes Indiana points in the Chicago Switching District. Midwestern and Mountain-Pacific Territories are collec-

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* Proposed Findings of Fact Nos. 1-26 are preliminary findings which relate to the general nature of this action, the reports and orders of the Interstate Commerce Commission under review, and other background matters. The remaining proposed Findings of Fact, No. 27 *et seq.*, relate specifically to the thirty issues in the List of Issues Remaining in Controversy filed by the parties in this Court.

tively known as Western Territory. The traffic involved is generally referred to as Transcontinental traffic.

2. The plaintiffs and intervening plaintiffs Amador Central Railroad Company et al. are collectively known as the Transconfinental or Mountain-Pacific lines. The five major Transcontinental lines—Great Northern, Northern Pacific, Santa Fe, Southern Pacific, and Union Pacific—have extensive operations in Midwestern Territory as well as in Mountain-Pacific Territory. Considered collectively, these five lines operate approximately 24,000 miles of road in Midwestern Territory, and three of them, Great Northern, Northern Pacific, and Southern Pacific, considered collectively, operate through subsidiary companies approximately 11,000 miles of road in Midwestern Territory—a total of approximately 35,000 miles.

3. (a) The defendants in this action are the United [fol. 1637] States of America and the Interstate Commerce Commission.

(b) The intervening defendants may be divided into two groups. One group embraces thirty-nine Eastern railroads whose operations are entirely or principally in Official Territory, and the Louisville and Nashville Railroad Company, a Southern Territory line which serves some stations in Official Territory. The other group embraces nine railroads which operate entirely or extensively in Midwestern Territory. These Midwestern lines, considered collectively, operate approximately 45,650 miles of road in Midwestern Territory.

4. The railroads which are parties to this action are all common carriers engaged in the transportation of property for hire and subject to the Interstate Commerce Act in respect to their interstate operations. All of them were parties to the proceedings before the Commission in which the orders under attack were entered, and all of them are parties to joint rates on Transcontinental traffic.

Reports and Orders of Commission Under Review

5. The reports and orders of the Commission here under attack were entered on March 21, 1963, June 20, 1963, and December 31, 1963, in Docket No. 31503 and Sub-Nos. 1-5, entitled *Akron, Canton & Youngstown Railroad Company, et al. v. Atchison, Topeka & Santa Fe Railway Company, et al.*, 321 I.C.C. 17, 322 I.C.C. 491. The order of June 20, 1963, merely clarified the initial report and order by correcting several inadvertent omissions.

6. The orders of the Commission relate to two separate but related interterritorial freight-rate divisions cases.

(a) One case involved the lawfulness as between the Eastern or Official Territory lines, as a group, and the Western lines, as a group, of the present primary divisions of joint rates on traffic between points in Official Territory and points in Transcontinental Territory. These primary divisions reflect a two-way divisional break over Chicago, Peoria, St. Louis, and other Eastern gateways. The con-[fol. 1638] test before the Commission was between all of the three contending groups of carriers—Eastern, Midwestern, and Transcontinental.

(b) The other case involved the lawfulness as between the Midwestern lines, as a group, and the Transcontinental lines, as a group, of (1) the present divisions of joint rates on traffic between points in Midwestern Territory and points in Transcontinental Territory, and (2) the present subdivisions of the Western primary divisions of joint rates on Official-Transcontinental traffic. The participants in these controversies were principally the Midwestern group of carriers and the Transcontinental lines.

(c) The divisions of joint rates on traffic between points in Official Territory and points in Montana and between points in Midwestern Territory and points in Montana covered by the orders of the Commission apply only on traffic via the Twin Cities (Minneapolis, Minnesota Transfer, and

St. Paul) and Duluth, Minn., and Superior, Wis.; and, without specific mention, this Montana traffic is generally included in references herein to traffic to and from Transcontinental Territory.

7. The Commission, in both its initial report of March 21, 1963, and its supplemental report of December 31, 1963, found that the present divisions of Transcontinental rates are unjust, unreasonable, and inequitable, and prescribed divisions which it found would be just, reasonable, and equitable. (321 I.C.C. at 78; 322 I.C.C. at 520) The divisions prescribed for the future in the supplemental report and order of December 31, 1963, are for the most part the same as those prescribed in the initial report and order of March 21, 1963.

(a) The initial order of March 21, 1963, required that the divisions prescribed in the initial report be established on or before July 1, 1963, and be thereafter applied. (PR 103-4)

(b) The order of December 31, 1963, dismissed all petitions for reconsideration or modification of the initial report and order, except insofar as the initial report and order were modified by the supplemental report and order. [fol. 1639] The Commission by its order of December 31, 1963, also denied a petition of Missouri-Kansas-Texas Railroad Company (Katy) and St. Louis-San Francisco Railway Company (Frisco) for further hearing. The order of December 31, 1963, required that the divisions prescribed in the supplemental report be established on or before March 30, 1964, and be thereafter applied. (PR 168-70) Several inadvertent errors of a clerical nature in the supplemental report were corrected by a notice to the parties issued by the Commission on February 4, 1964. (PR 171-72)

8. The divisions prescribed by the Commission are in part specific percentage divisions of rates on shipments moving between specified territorial groups and in part

divisions to be determined by the use of scales of divisional factors. The specific divisions were prescribed as primary divisions east and west of Chicago, Peoria, St. Louis, and other Eastern gateways for application as between the Eastern lines, as a group, and the Western lines, as a group, on traffic between territorial groups in Official Territory and territorial groups in Transcontinental Territory. The scales of divisional factors were prescribed for the determination of (1) primary divisions on Midwestern-Transcontinental traffic east and west of the eastern border of Mountain-Pacific Territory, (2) subdivisions of the Midwestern primary divisions on Midwestern-Transcontinental traffic on shipments interchanged in Midwestern Territory between complaining Midwestern lines and defendants in their respective complaints, and (3) subdivisions of the Western shares of the revenue on Official-Transcontinental traffic. The divisional factors prescribed for hauls in Mountain-Pacific Territory are 10 percent higher than those prescribed for a corresponding haul in Midwestern Territory. The new bases of divisions prescribed would increase the proportions of revenue from Transcontinental traffic received by the Eastern lines, make some increases and some reductions in the proportions of the Midwestern lines, and decrease the proportions re-
[fol. 1640] ceived by the Transcontinental lines.

Proceedings Before the Commission

9. After seven years of unsuccessful negotiations to secure an increase in their divisions on Transcontinental traffic, which had not been revised since 1922, the Eastern lines on April 5, 1954, filed their complaint (No. 31503), which began the proceedings here under review. (321 I.C.C. at 19; Exhibit E-1, pp. 15-19) This complaint was followed by the complaint in Sub-No. 1, which was filed by a large group of Midwestern lines on June 3, 1954, after unsuccessful negotiations with the Transcontinental lines for a revision of the divisions had failed. (321 I.C.C. at 20;

Exhibit MW-197, pp. 8-9, Apps. A-I) The complaint in Sub-No. 1, the Commission found, ranked with the complaint of the Eastern lines as one of the two major components of the administrative proceedings. (321 I.C.C. at 20) The group of Midwestern lines which filed the complaint in Sub-No. 1 is represented in this Court by intervening defendants Chicago and North Western Railway Company et al. The complaints in Sub-Nos. 2 and 3 were filed by the Burlington System and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road), respectively, and are similar to the complaint in Sub-No. 1. (321 I.C.C. at 20) The complaints in Sub-Nos. 4 and 5 were filed by the Louisville and Nashville Railroad Company and the Southern Railway Company and a subsidiary, which have lines in the section of Official Territory between Ohio River Cities and East St. Louis, Ill., and were similar to the complaint of the Eastern lines. Cross-complaints were filed by the Transcontinental lines and various other parties. (321 I.C.C. at 19-20)

(a) Considered collectively, the complaints and cross-complaints brought in issue the lawfulness under the Interstate Commerce Act of the existing divisions of joint rates on Transcontinental traffic. The parties before the Commission included substantially all railroads operating in [fol. 1641] Official, Midwestern, and Mountain-Pacific Territories, and the public bodies which are intervening plaintiffs in this Court. (321 I.C.C. at 18-19)

(b) The proceedings before the Commission were tried, heard, and submitted by the parties primarily as controversies between the three major contending groups of carriers; and the decision of the Commission was rendered on that basis. Sixteen hearings aggregating 76 days were held intermittently during the period from April 26, 1955, to December 11, 1959. Direct testimony was principally in writing contained in the exhibits, of which there were 834. Oral testimony, mainly on cross-examination, made up the transcript, which comprised 11,242 pages. The ini-

tial briefs filed by the three groups of principal rail carriers in June 1960 covered 1,145 pages plus voluminous appendices. (321 I.C.C. at 18)

10. The conclusions of the Commission with respect to the divisions in issue differ to some extent from those recommended by the Hearing Examiners. The Commission found that "To increase the [Transcontinental] defendants' divisions by an average of 10 percent in recognition of claimed revenue need would have the effect of requiring the eastern and the midwestern railroads to absorb the greater part of the reductions in the interterritorial class rates to and from Mountain-Pacific territory approved by the Commission in 1955, based principally on improved economic and transportation conditions in that territory." (321 I.C.C. at 70-71) In general, the divisions prescribed by the Commission in the initial report and order of March 21, 1963, and again, with some modifications, in the supplemental report and order of December 31, 1963, are greater for the Eastern lines than those recommended by the Examiners, and are lower in some instances and greater in other instances for the Midwestern and Transcontinental lines than those recommended by the Examiners.

11. In July 1963, petitions for reconsideration or modi- [fol. 1642] fication of the initial report and order of March 21, 1963, as amended by the order entered on June 20, 1963, were filed by the Transcontinental lines, the Mountain-Pacific State Commissions, the complainant group of Midwestern lines, the Milwaukee Road, the Wabash Railroad Company, the Katy, and the Frisco. These petitions were considered and discussed in detail by the Commission in its supplemental report (322 I.C.C. at 492-520), and were denied by its accompanying order of December 31, 1963, except insofar as the initial report and order were modified by the supplemental report and order of December 31, 1963. (PR 169) In July 1963, the Katy and Frisco also filed a petition for leave to file a petition for further hear-

ing, and tendered therewith the petition for further hearing which they sought leave to file. These petitions were considered and discussed by the Commission in its supplemental report, and by its order of December 31, 1963, the Commission granted the petition for leave to file a petition for further hearing and denied the petition for further hearing so tendered. (PR 169)

Basic Transcontinental Divisions and Their History

12. Joint rates and divisions on Transcontinental traffic were established in 1874 between Midwestern Territory and the Pacific Coast, five years after the completion of the first Transcontinental route. In 1887, joint rates and divisions were established on Transcontinental traffic between Official Territory and the Pacific Coast. The divisions on Transcontinental traffic have been a source of recurring controversy between the Transcontinental lines, on the one hand, and the Midwestern and Eastern lines, on the other. The original divisions between Midwestern Territory and Transcontinental Territory were based upon some form of mileage prorate in which the factors for the hauls of the Transcontinental lines were based on constructive distances which were 150 percent of the actual distances. The Commission found that, because of their long [fol. 1643] hauls, this constructive mileage prorate basis was highly favorable to the Transcontinental lines, which contended that their distance inflation was necessary to compensate them for adverse mountain grades and light density of population and traffic. (321 I.C.C. at 26)

13. There were numerous changes of a minor nature in the divisions on Official-Transcontinental traffic between 1887 and 1921. During much of that period, the Eastern lines' divisions of Transcontinental rates to and from New York City and other points in the New England-Seaboard Group were 25 percent via Chicago, 27.5 percent via Peoria, and 29 percent via St. Louis. The Chicago division was equivalent to a constructive mileage prorate with a Western

inflation of 25 percent. In 1922, by agreement, the divisions of the Eastern lines were increased—between New York City and Chicago to 27.5 percent, between New York City and Peoria to 31 percent, and between New York City and St. Louis to 31.5 percent. These are the present basic group divisions.

(a) These basic group divisions are subject to certain exceptions and special divisions which accord Eastern lines somewhat greater proportions on certain traffic. (Exhibit E-1, pp. 8-9; EPR 12; Exhibit T-242, pp. 23-33, EPR 347-348; 321 I.C.C. at 26-27) The primary group divisions prescribed would apply on all traffic without exception.

(b) The divisions received by the Transcontinental lines on Official-Transcontinental traffic from and to interior points in Transcontinental Territory, such as Phoenix, Ariz., Spokane, Wash., and Reno, Nev., are the same as those received by them on traffic to and from the Pacific ports, although their hauls to and from the interior points are substantially less. (321 I.C.C. at 27)

14. The present divisions on Midwestern-Transcontinental traffic developed from the divisions originally established for hauls of Midwestern lines east of the Missouri River Crossings (principally, Council Bluffs, Iowa, Omaha, Neb., and Kansas City, Mo.-Kan.) and the Twin [fol. 1644] Cities, and for hauls of the Transcontinental lines west thereof. The divisions were made 15 percent between Chicago and the Missouri River Crossings or the Twin Cities, and 11 percent between St. Louis and the Missouri River Crossings. In 1923, in its Docket No. 15234, the Commission undertook an investigation on its own initiative of the lawfulness of divisions in Western Territory. During the pendency of the proceeding, the Transcontinental lines and the Midwestern lines in the section of Midwestern Territory generally east of the Missouri River Crossings and the Twin Cities, known as Midwest-East Territory, reached an agreement, effective July 1, 1925, which increased the division between Chicago and

the Missouri River Crossings or the Twin Cities to 16.5 percent, and the division between St. Louis and the Missouri River Crossings to 12.1 percent. These are the present divisions. (321 I.C.C. at 28)

(a) Following the execution of that agreement, the investigation in Docket No. 15234 was continued; and, after further hearings, the Commission, in 1934, found that the evidence of record was "voluminous but most unsatisfactory," and further found: "we are unable to find that the divisions of the transcontinental rates are unlawful." *Divisions of Freight Rates*, 203 I.C.C. 299, 335. (321 I.C.C. at 28)

(b) Docket No. 15234 was reopened by the Commission in 1940 for the purpose of again considering the divisions on Transcontinental traffic. After further hearings were commenced, war conditions made further consideration impracticable, and the proceeding was discontinued "without prejudice." (321 I.C.C. at 28)

15. In its decision in *Divisions of Freight Rates, supra*, the Commission found that, measured by mileage, the divisions of the Transcontinental lines which resulted from the 1925 agreement on the Transcontinental traffic through the Missouri River Crossings and the Twin Cities there involved reflected a weighted average inflation of slightly less than 25 percent.

(a) The Commission found that the average inflation [fol. 1645] of the Transcontinental lines, measured by mileage, on all involved Midwestern-Transcontinental traffic is now 19 percent. The inflation in the present divisions of the Transcontinental lines on Transcontinental traffic runs as high as 85 percent, which is the inflation reflected in the division received by the Union Pacific for its haul west of Council Bluffs on a shipment from Chicago to Boise, Idaho. (321 I.C.C. at 29)

(b) In some instances, for example, on traffic between Dallas (an important point served by the Katy and the

Frisco) and Seattle via Kansas City, the present divisions of the Transcontinental lines are less than they would be under a straight mileage prorate. (321 I.C.C. at 29)

(c) The divisions of the Transcontinental lines on Midwestern-Transcontinental traffic, like their divisions on Official-Transcontinental traffic, are blanketed over all Transcontinental Territory, and the Transcontinental lines thus receive the same divisions on traffic to and from interior points in Transcontinental Territory as they receive for their much longer hauls to or from the Pacific ports. (321 I.C.C. at 29)

16. The Midwestern-Transcontinental divisional percentages on traffic to and from Chicago, Peoria, St. Louis, and other Eastern gateways are also employed in subdividing the Western shares of the revenue on Official-Transcontinental traffic. The division of 72.5 percent west of Chicago out of the rates between New York and Transcontinental Territory is subdivided by allowing the Midwestern lines for service between Chicago and the Missouri River Crossings or the Twin Cities 12 percent of the through rate (16.5 percent of 72.5 percent), and the Transcontinental lines 60.5 percent of the through rate (83.5 percent of 72.5 percent). If the traffic moves via St. Louis and Kansas City, the Midwestern lines receive 8.3 percent of the through rate (12.1 percent of 68.5 percent), and the Transcontinental lines 60.2 percent of the through rate (87.9 percent of 68.5 percent). (321 I.C.C. at 29)

[fol. 1646]

Representative Present and Prescribed Divisions

17. Generally speaking, the assailed orders of the Commission would increase the divisions of the Eastern lines. Some of the divisions of the Midwestern lines would be increased and others would be reduced. With some exceptions, the divisions of the Transcontinental lines would be reduced. Appendix A attached hereto shows representa-

tive present and prescribed divisions via the Chicago and St. Louis gateways on Official-Transcontinental traffic between the Eastern groups and the Pacific Coast group (W-5), which accounts for over 90 percent of this traffic. Appendix B attached hereto shows the present and prescribed subdivisions for Midwestern lines on traffic between New York and representative Pacific Coast points. Appendix C attached hereto shows the present and prescribed divisions between representative points on Midwestern-Transcontinental traffic.

Official-Transcontinental Traffic

18. Traffic studies for 1953 and 1955 indicate that the traffic between Official and Mountain-Pacific Territories amounts to an annual volume of approximately 910,000 carloads, or 22.9 million tons, and yields about $890 million in annual revenue. (321 I.C.C. at 21) The assailed orders of the Commission apply only to the Official-Transcontinental part of the traffic included in the foregoing studies. Approximately 63 percent of the carloads were eastbound. (321 I.C.C. at 21) The Transcontinental lines' traffic study to which costs were applied, indicates the following division of the total revenue as settled: Eastern lines, 21.8 percent; Midwestern lines, 19.5 percent; and Transcontinental lines, 58.7 percent. (321 I.C.C. at 33 and 47)

19. The average hauls on Official-Transcontinental traffic, based on short-line distances, are approximately 600 miles in Official Territory and 2,000 miles in Western Territory. (321 I.C.C. at 21) For purposes of comparison, [fol. 1647] representative distances on Official-Transcontinental traffic were found by the Commission to be 600 miles for Eastern lines, 700 miles for Midwestern lines, and 1,600 miles for Transcontinental lines. (321 I.C.C. at 30)

20. The great majority of the carloads of Official-Transcontinental traffic were interchanged between Eastern and

Western lines at Chicago, St. Louis (including East St. Louis), and Peoria. More than 60 percent were interchanged at Chicago, approximately 18 percent at St. Louis, and 3 percent at Peoria. The entire hauls west of the interchange points on approximately 27 percent of the traffic were performed by a single Transcontinental railroad or Transcontinental system of railroads. The Official-Transcontinental traffic in which the Midwestern lines participate was interchanged between those lines and the Transcontinental lines largely at the Missouri River Crossings, El Paso, Twin Cities, and Colorado Junctions (principally Denver and Pueblo). (321 I.C.C. at 23)

Midwestern-Transcontinental Traffic

21. The traffic study of the Transcontinental lines for 1953 indicates an annual movement of 787,549 carloads and total revenue of $634.8 million between Midwestern and Transcontinental Territories. Approximately 60 percent of the movement was eastbound. (321 I.C.C. at 24) The Transcontinental lines' study to which costs were applied indicates a division of the total revenue of 27.1 percent for the Midwestern lines and 72.9 percent for the Transcontinental lines. (321 I.C.C. at 33 and 47)

22. The most important points of interchange of Midwestern-Transcontinental traffic between Midwestern lines and Transcontinental lines, stated in the order of importance, are Kansas City, Council Bluffs, El Paso, Twin Cities, and Colorado Junctions. The Commission found that, for purposes of comparison, representative distances on Midwestern-Transcontinental traffic are 700 miles for [fol. 1648] Midwestern lines and 1,600 miles for Transcontinental lines. (321 I.C.C. at 31)

(a) The average hauls by territories, as distinguished from the average hauls by groups of railroads, are approximately 1,000 miles in Midwestern Territory and over 1,200 miles in Mountain-Pacific Territory. (321 I.C.C. at 70)

(b) The long average haul of the Transcontinental lines (1,600 miles) results from the fact that the five major Transcontinental railroads have extensive operations in Midwestern Territory as well as in Mountain-Pacific Territory.

Public Importance of Transportation Services

23. The importance to the public of the transportation services of the carriers involved in handling Transcontinental traffic was considered and discussed by the Commission, and its findings are not here challenged. Mention was made of the Eastern lines' request for a finding that the transportation services of the contending groups of carriers were important to the public, and of the Midwestern lines' contention that there was no real issue with respect to the public importance of the transportation services of any of the contending carriers. (321 I.C.C. at 68) The Commission also discussed the contention of the Transcontinental lines, supported by intervening Mountain-Pacific state commissions, that the divisions of the Transcontinental lines on Transcontinental traffic should be increased because of the public interest in maintaining and developing railroad transportation in Mountain-Pacific Territory. (321 I.C.C. at 69-70) At the conclusion of its discussion, the Commission found (321 I.C.C. at 70):

> "As estimated by the [Transcontinental] defendants, 'the average hauls on transcontinental traffic are over 1,200 miles in Mountain-Pacific territory, approximately 1,000 miles in the midwest, and 630 miles in official territory.' Since about 58 percent of the total [fol. 1649] service measured by miles is rendered in the two territories last named, the railroads performing that service also have an important part in transcontinental transportation. In our opinion there are no differences in the importance to the public attributable to the three contending groups of carriers."

Unlawfulness of Present Divisions.

24. The ultimate findings of the Commission in its initial and supplemental reports that the present divisions of Transcontinental rates on Official-Transcontinental and Midwestern-Transcontinental traffic are unjust, unreasonable, and inequitable are not challenged in this Court. (321 I.C.C. at 78, Findings 1 and 3; 322 I.C.C. at 520, Findings 1 and 3)

(a) In its initial report, the Commission found "that the present divisions are favorable to the [Transcontinental] defendants to an extent not justified by ascertainable cost differences." (321 I.C.C. at 70) The Commission also found that the public interest did not warrant an increase in the divisions of the Transcontinental lines, but "that there should be increases in the [Eastern] complainants' divisions reflecting revenue need as well as cost." (321 I.C.C. at 71) As between the Transcontinental lines and the Midwestern lines, the Commission found, "the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low." (321 I.C.C. at 72)

(b) In the supplemental report, the Commission found: "Upon the facts of record as a whole we believe that the existing divisions are shown to be unjust, unreasonable, and inequitable * * *." (322 I.C.C. at 493) The Commission further found "that the revenues of the eastern and midwestern lines derived from the present divisions are too low in relation to costs." (322 I.C.C. at 499) The supplemental report also contains the following finding (322 [fol. 1650] I.C.C. at 500):

> "We reject petitioning [Transcontinental] defendants' contention concerning their greater costs and revenue needs as unsupported by evidence of record. In our opinion there is no substantial evidence which would warrant a finding either that they are entitled to an

increase in their divisions or that the present divisions are fair and should be maintained. The evidence of record is substantially to the contrary."

Interlocutory Injunctions

25. Two judgments for interlocutory injunction were entered by this Court.

(a) The first judgment, dated August 3, 1963, enjoins the enforcement, operation, and execution of the order of the Commission dated March 21, 1963, as amended by its order dated June 20, 1963, pending the final hearing and determination of this action in this Court, or until the further order of this Court, upon conditions which provide that, if the order of March 21, 1963, as amended by the order of June 20, 1963, is not permanently enjoined, set aside, annulled or suspended by this Court upon final hearing or determination of this action, it will be deemed to be effective for all purposes as of and from July 1, 1963, and appropriate indemnification shall be made on specified terms.

(b) The second judgment, dated March 21, 1964, was entered upon a supplemental complaint of the Transcontinental lines and an amended complaint of the Frisco, and enjoins the enforcement, operation, and execution of the order of the Commission dated December 31, 1963. This judgment provides that, if the Commission's order of December 31, 1963, is not permanently enjoined, set aside, annulled or suspended by this Court upon final hearing or determination of this action, it will be deemed to be effective for all purposes as of and from March 30, 1964, and appropriate indemnification shall likewise be made.

[fol. 1651]

Issues Remaining in Controversy

26. Pursuant to an order of this Court dated August 27, 1964, entered after all briefs had been filed, the parties

filed with this Court a List of Issues Remaining in Controversy. The parties there agree that, since this case is being heard upon the certified record of the proceedings before the Commission without the taking of additional evidence by this Court, there are no issues of fact to be litigated, except such factual matters as may be involved in the issues as stated. Thirty issues are described in the list. The parties agree on the statement of seven of these issues; and plaintiffs and intervening plaintiffs submitted their statement and defendants and intervening defendants their statement of the other twenty-three issues. Issues Nos. 1-13 relate principally to questions raised with respect to the sufficiency of the findings made by the Commission to support the divisions it prescribed; Issues Nos. 14-19 relate to questions with respect to revenue needs; Issues Nos. 20-29 relate to questions with respect to relative cost of service; and Issue No. 30 presents the question whether any errors which may have been committed by the Commission with respect to certain designated issues were prejudicial within the meaning of Section 10(e) of the Administrative Procedure Act and other than *de minimis*.

Findings re Issues Nos. 1-4

27. The proceedings before the Commission were tried, heard, submitted and decided as controversies between carrier groups and not as between individual railroads. The complaint of the Eastern lines sought increases in their primary group divisions as against the Western lines as a single group. The Midwestern group sought increased divisions on Midwestern-Transcontinental traffic and on the Official-Transcontinental traffic in which they [fol. 1652] participated as intermediate carriers. Under the present system of primary divisions of interterritorial rates, the Eastern lines are not concerned in the subdivisions within Western Territory, nor are Western lines concerned in the Eastern subdivisions. No railroad asked the

establishment of divisions for itself individually different from those to be fixed for the group to which it belonged.

28. The complainants before the Commission asked the establishment of divisions on fair proportionate bases without regard to the amount or compensatory character of the rates to which such proportions would apply. None of the complainants asked for the prescription of divisions in absolute amounts.

(a) No carrier group, on the ground of financial weakness, asked for divisions larger than "justice merely" as between the groups would suggest.

(b) All divisions prescribed by the Commission's orders under review are in terms of proportions of joint rates of whatever amount or compensatory character.

29. Before the Commission, on the subject of general revenue needs the parties adduced a large volume of evidence relating to various aspects of the subject. These data, in accordance with customary practice among railroads and customary procedures in presenting divisions cases, were of great variety and included such customary indicia of revenue needs as rates of return, net railway operating income, and traffic trends. The Commission made extensive findings with respect to relative revenue needs, and more than one-fifth of the text of its reports was devoted to its evaluation of this evidence. (321 I.C.C. at 53-67; 322 I.C.C. at 499-505). Subsidiary findings made with respect to these matters may be summarized as follows:

(a) The economic development of the Mountain-Pacific states in the years from 1920 to 1952 was much faster and more marked than in other portions of the country. During that period, the total increase in population for the [fol. 1653] Mountain-Pacific states was 134.7 percent compared to 47.4 percent for the United States. The 1960 census figures show that from 1920 to 1960 the population of the Mountain-Pacific states increased 205 percent, and that

of California more than doubled between 1940 and 1960. (321 I.C.C. at 53) Further on this subject the Commission found: (321 I.C.C. at 53).

> "In 1890, when the divisions here under consideration had begun to conform to their present pattern, the population of the Mountain-Pacific States was 3.102 million, 5 percent of the total of the entire country. The present population of the same States, 26.9 million, is 15 percent of the total. The shifts in population and consequent economic changes have also had marked effects on the fortunes of the railroads."

(b) The Commission found that the period from 1923 to 1930 inclusive affords a fair basis of comparison with the post-World War period since 1945. The average annual freight traffic of the American railroads measured by revenue ton-miles was about 44 percent greater in 1946-1958 than it was in 1923-1930 but the increase was by no means uniform. The Commission then considered the changed percentages of total United States traffic in the various districts over the periods indicated and then found (321 I.C.C. at 54):

> "Some features of the foregoing figures should be emphasized, notably the increase of nearly 124 percent for the transcontinental group. The increase for the western district other than that group was 55 percent, somewhat more than the southern increase of 51 percent. The increase for the eastern and Pocahontas lines was only 12 percent and was responsible for the striking decline of their share of the total from 51.9 percent in 1923-30 to 42.1 percent in 1946-58, putting them below the western district."

(c) The increased freight revenue for the Transcontinental group over the same period was the subject of [fol. 1654] specific consideration by the Commission concerning which it found (321 I.C.C. at 54):

"The increase in the figure for the transcontinental group was 142 percent, compared with the overall average increase of 76 percent. For the western district other than the transcontinental group, the average increase was 70 percent."

(d) Net railway operating income represents the operating revenues less operating expenses and taxes. The Commission compared the net railway operating income for the several groups of railroads in the United States for the period 1946-1958 with the period 1923-1930 which disclosed relatively greater increases for the western district and the Transcontinental group than for the Eastern railroads. With respect to these comparisons, the Commission found (321 I.C.C. at 55):

"The most significant feature of the latter statement is the reduction of 31 percent for the carriers in official territory, contrasted with the overall reduction of 14 percent."

(e) Summarizing the effect of the relative data concerning revenue ton-miles, freight revenue, and net operating railway income for the periods indicated, the Commission further found (321 I.C.C. at 55):

"The three comparative statements last above shown indicate clearly the inferior position of the railroads in official territory as freight carriers, compared with the western district since World War II. In 1923-30, the annual average ton-miles of the official territory lines exceeded those of the western district by 51 percent; in 1946-58 the official average was 4 percent lower than the western. The official lines in 1923-30 had 30 percent more freight revenue than the western district; they had 0.3 percent less in 1946-58. The net railway operating income of the official lines in 1923-30 was 31 percent greater than that of the western district; in 1946-58 it was 9 percent less.

"The three statements also show the growing importance of the transcontinental lines. In 1923-30 they [fol. 1655] accounted for 40.6 percent of the ton-miles of the western district; their percentage in 1946-58 was 49.6. Their freight revenue in 1923-30 was 41.5 percent of the total for the western district; this percentage increased to 50.2 in 1946-58. The transcontinental lines' percentage of the total net railway operating income of the western district, however, increased only from 49 percent in 1923-30 to 50 percent in 1946-58, for reasons discussed infra."

(f) The Commission considered much data relating to rates of return. In so doing, it noted the contention of Transcontinental lines that the years 1955, 1956, and 1957 should be taken as a standard for comparing the group results. On this subject, the Commission found (321 I.C.C. at 55-56):

"Comparative rates of return on investment represented by the earnings above shown will now be considered. The defendants say that such comparisons should be centered on '1955 and 1956, the most recent years of normal business activity and also for 1957, a year influenced by the recent recession.' These years were 3 of the only 4 years between 1946 and 1958 in which the net railway operating income of the eastern roads exceeded that of the roads in the western district, 1953 being the other. Consequently, in these 3 years the eastern figure exceeded the western by about 7 percent. The average rate of return for the eastern district and the Pocahontas region in this period was 3.82 percent and for the western district 3.50 percent. In the 13 years, 1946-58, as a whole, eastern net railway operating income was 9 percent lower than the western. (The effect of differing passenger deficits on this comparison will be pointed out later.)"

(g) Concerning the property base upon which rates of return were to be calculated, the Commission gave consideration both to rates of return from all services on the basis of book investment (meaning recorded investment in road and equipment, materials and supplies, and cash, less accrued depreciation and amortization) and on the basis [fol. 1656] of the elements of value determined by use of the Commission's valuation data. (321 I.C.C. at 56-57)

(h) For the Eastern district and Pocahontas region roads (herein referred to as the Eastern lines) the rates of return during the period 1946-1958 were relatively inferior to those for the western district and to those for the Transcontinental group. The relatively worse position of the Eastern roads was disclosed more sharply when the ICC valuation data were used as the property base. On this subject, the Commission found (321 I.C.C. at 57):

> "The difference is due principally to the discrepancy between recorded investment and valuation data for the transcontinental lines."

The Commission then gave consideration to the contention of Transcontinental lines that only book investment figures should be employed. But after detailed discussion, the Commission made the following finding with respect to the property base most significant for the determination of relative revenue needs in this case (321 I.C.C. at 58):

> "In our judgment, controlling weight should be given the showing based on elements of value consistently with the views expressed by the Commission in other divisions cases."

(i) The Commission also gave consideration to the effect upon Eastern and Midwestern rate of return data if, as contended by Transcontinental lines, the figures for the New York Central and the Chicago & North Western were omitted from the totals for their respective groups on the

ground that their earnings were temporarily depressed during the period considered. After stating the group results with such omissions, the Commission in effect found no warrant for omitting from the respective groups the figures for the railroads mentioned. (321 I.C.C. at 58-59)

(j) The Commission also considered comparisons of rates of return as modified to reflect the so-called acquisi- [fol. 1657] tion adjustment account. This was the subject of extended consideration by the Commission in view of the requirement of section 15(6) that the Commission give due consideration, among other things, to the amount of revenue required to pay a "fair return on their railway property held for and used in service of transportation." In conclusion, the Commission found (321 I.C.C. at 60):

> "In our opinion controlling consideration need not be given to the acquisition adjustment in connection with evidence pertaining to the 'fair return' mentioned in section 15(6)."

(k) The Commission also gave consideration to the comparisons of net railway operating income because of certain distortions in the incidence of the Federal income tax. Since that tax applies to non-operating income, known as "other income," as well as revenue from railway operations, the Transcontinental lines' net railway operating income would reflect larger deductions for federal income tax than in the case of the other groups because of their larger proportions of other income. Of similar character was the availability of income-tax savings from accelerated amortization of cost of defense projects completed before 1956. These factors were taken into account by the Commission, which then set forth the average rates of return on book investment using both unadjusted and adjusted net railway operating income for the period 1951-1958 for the Eastern, Midwestern, and Transcontinental lines. On both bases, the Transcontinental lines had higher rates of return than those of the other groups. (321 I.C.C. at p. 61)

(l) In addition to the rates of return covered by all services, the Commission also gave consideration to statistics for the years 1950-1958 showing freight net railway operating income for the larger railroads in all territories. This disclosed that if passenger deficits were not taken into account, the markedly greater earning power of the Transcontinental lines was manifest.

(m) As a further consideration effecting revenue needs, [fol. 1658] the Commission gave consideration to the testimony of Transcontinental lines' witnesses concerning restrictions in general rate increases which Transcontinental lines had borne in order to be competitive with other producing areas in Eastern markets. (321 I.C.C. at 63)

(n) The Commission gave additional consideration to the evidence and contention of Transcontinental lines that "the increased investment required in serving the growing mountain Pacific territory has produced no return for the owners of the mountain Pacific roads." After thorough evaluation of the pertinent facts, the Commission concluded that the contention of Transcontinental lines was unsound in that a substantial return had been realized upon the increased investment but had been obscured by the passenger deficits. (321 I.C.C. at 64-65)

(o) As a conclusion of its consideration of the subject of revenue need, the Commission found (321 I.C.C. at 65):

> "Upon the facts relating to revenue need discussed on preceding pages, it is our conclusion that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district. The most favorable comparison from the standpoint of the western lines, we believe, is the showing that the average return of the eastern district and Pocahontas region in 1946-58, based on net railway operating income from all services adjusted for income tax differences as before explained, related to book investment, was 3.26 percent, compared with 3.34 percent for the

midwestern group and 3.89 percent for the transcontinental defendants. If the elements of value are used as the investment base, the percentages become 3.40 for the eastern lines, 3.49 for the midwestern group, and 4.64 for the defendants."

(p) As a further finding on the subject of revenue need, the Commission referred to the post war trend of declining freight traffic of the Eastern railroads (321 I.C.C. at 65):

[fol. 1659] "Of greater significance than this comparison of rates of return is the postwar trend of declining freight traffic of the eastern railroads shown on this record. Their average annual ton-miles for the period 1947-58, 253.4 million, were 4 percent lower than the number, 263.6 million in 1946. In only 4 of those years, 1947, 1948, 1951, and 1956, did their traffic measured by revenue ton-miles exceed that of 1946. The railroads in the western district, on the other hand, had an average of 265.3 million ton-miles per year in the same period, compared with 244.2 million in 1946, an increase of 9 percent. In only one year, 1949, did the western district fail to show an increase over 1946. For many years prior to 1949 the western district was below the eastern district and Pocahontas region with respect to total revenue ton-miles, but that year marked a turning point. In the decade 1949-58 the western district has led the East by an average difference of 7 percent. No developments are in sight which point to a reversal of this trend."

(q) The Commission also considered at length the revenue need of the Midwestern lines (321 I.C.C. at 65-67) and in conclusion found (321 I.C.C. at 67):

"Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their pros-

pects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads.

30. Before the Commission the Transcontinental lines, on petition for reconsideration, contended that where the Commission undertakes to base a change in divisions on the ground of "revenue need", the Commission must find (1) the amount of revenue its order would transfer; (2) [fol. 1660] that such a transfer is necessary to meet the fair proportion of the complainant carriers' revenue that should be met from the traffic at issue; and (3) that the transfer will not unduly impair the defendant carriers' ability to meet their own revenue needs. In its supplemental report (322 I.C.C. at 499-502) the Commission discussed these contentions in the light of certain divisions cases which reached the Supreme Court and rejected them, finding (322 I.C.C. at 499-500):

> "These contentions are grounded on erroneous assumptions of fact and of law. Our prescription herein of just and equitable divisions for the future is in no sense a 'transfer' of money nor is it based solely on revenue needs.
>
> * * * * * * *
>
> "Our authority under the above provision of section 15(6), which requires due consideration, among other things, to revenue need, is not limited in concept or scope. We are thereby authorized 'to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property,' as well as 'the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration.'

Baltimore & O. R. Co. v. *United States,* 298 U.S. 349, 360, 370. We are free to give such evidence the weight which the particular circumstances appear to justify. In our determination herein we have received and considered evidence in relation to these as well as all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the beneficial and alleged detrimental aspects of the prescribed divisions.

* * * * * * *

"There is no rule, statutory or otherwise, requiring [fol. 1661] that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions. Nor is there authority to support the contention that such evidence as to revenue need can only be considered when it is possible to make the three findings suggested above."

31. The Transcontinental lines' contentions that the Commission must make specific findings with respect to the amount of revenue required and the effect thereon of the divisions prescribed relates only to instances where "the Commission undertakes to base a change in divisions on the ground of revenue need" apart from a consideration of relative service costs. In their exceptions (p. 80) to the Examiners' report they stated:

"A transfer of revenue based exclusively on proof of the parties' relative cost contributions to the service performed and not in any degree involving the public interest, may presumably be ordered whatever the amount."

The Eastern lines' proportion of total revenues under the order does not exceed their proportion of the total costs of service.

(a) In its initial report the Commission found that on the sample of 1953 traffic moving between Mountain Pacific and Official territories, embraced in Transcontinental lines' cost study, the Eastern lines received 21.8 percent of the total revenue as settled and bore 26.1 percent of the total costs as restated by the Commission and 26.7 percent of the total Rail Form A Costs (321 I.C.C. at 47, 49).

(b) In its supplemental report the Commission referred to a supporting study made by Midwestern Lines covering a sample of 1953 traffic moving over their roads between Official territory and Transcontinental territory including Montana. Like the Transcontinental study the Midwestern lines' study showed that Eastern lines, under existing divisions, received 21.8 percent of the total revenue. (322 I.C.C. [fol. 1662] 507). Application of the prescribed divisions to this traffic, as found by the Commission, would have yielded to Eastern lines a little more than 25.3 percent of the total revenue as compared with the 26.1 percent of total costs borne by them (322 I.C.C. at 508).

(c) The Commission then found that the prescribed divisions "would have returned to the eastern roads a share of the revenues slightly less than their share would have been in proportion to out-of-pocket costs based on the above traffic." (322 I.C.C. at 508).

(d) On the Official-Mountain Pacific traffic the total revenue as settled was approximately 145 percent of the total out-of-pocket costs. On the Midwestern-Mountain Pacific traffic total revenues were about 161 percent of the total out-of-pocket costs. (321 I.C.C. at 47). There is no contention by any party that the total revenues on either the Official-Transcontinental traffic or the Midwestern-Transcontinental traffic were not fully compensatory.

(e) The Commission found that on the Official-Mountain Pacific traffic the three carrier groups bore the following proportions of the total out-of-pocket costs as restated by

the Commission: Mountain Pacific, 54.1 percent; Midwest, 19.8 percent; and Official 26.1 percent. These it compared with proportions of total revenues received by the three groups under the existing divisions of 58.7, 19.5, and 21.8 percent, respectively (321 I.C.C. at 47).

(f) On the Midwest-Mountain Pacific traffic the Midwestern lines bore 31.5 percent of the total out-of-pocket costs as restated by the Commission, and the Mountain Pacific lines 68.5 percent, as compared with percentages of revenue received under the divisions as settled of 27.1 and 72.9 percent, respectively (321 I.C.C. at 47).

(g) The Commission found that the Eastern lines, under the divisions ordered, would receive a little more than 25.3 percent of the total revenue, representing an average increase of about 16.4 percent in the present divisions, as compared with 26.1 percent of the total out-of-pocket costs, as [fol. 1663] restated, borne by them. (322 I.C.C. at 508) The complementary situation is that the Western lines, under the prescribed primary divisions on the Official traffic, would obtain 74.7 percent of the total revenue while bearing but 73.9 percent of the total out-of-pocket costs on the traffic. On the Midwestern-Transcontinental traffic, the Commission found that the prescribed divisions would produce "moderate" increases in Midwestern divisions. (321 I.C.C. at 77)

(h) Transcontinental lines' computation (Reply Brief, Appendix A) to show that Eastern lines, under the prescribed divisions, would obtain greater revenues than a cost basis would warrant, results from applying as divisional factors the Rail Form A costs on a "fully distributed" basis. Before the Commission, the Transcontinental lines contended that an out-of-pocket cost basis should be used, and the Commission accepted their costs on that basis. (321 I.C.C. at 50-51) If Transcontinental lines' computation were adjusted to an out-of-pocket cost basis, the Eastern proportion of total revenue accumulated by applying

costs to the traffic shipment-by-shipment would be increased from 24.1 percent to 25.6 percent, as compared with the 25.3 percent the Commission found Eastern lines would receive under the prescribed divisions. If the 25.6 percent figure were readjusted downward to reflect the relationship of the Eastern percentages of total out-of-pocket costs on the Rail Form A basis and as restated by the Commission (26.1 ÷ 26.7 = .978, as per 321 I.C.C. at 47), it would indicate that application of such costs on a shipment-by-shipment basis would accord Eastern lines 25.0 percent of the total revenue as compared with the 25.3 percent under the orders. But the Transcontinental lines' computation, as well as the adjustments just described, erroneously assumes that the Commission, in giving consideration to relative costs, is confined to appraising their significance on a shipment-by-shipment basis and may not consider them, as it here did, on an aggregate basis. (321 I.C.C. at 46).

[fol. 1664] (i) In contending that Midwestern lines' 319-car study of 1953 traffic—which the Commission found corroborative of its conclusions—was not representative, the Transcontinental lines refer to the testimony of an Eastern witness who differentiated its scope from Eastern lines' traffic study, which covered all Mountain-Pacific territory, but on which the Commission did not rely. (Pltfs. Reply pp. A-4, A-5; PR 449-450; 321 I.C.C. at 31) But in covering Transcontinental Territory and Montana traffic, the 319-car study conforms to the geographical scope of the Commission's order prescribing divisions on the Official Territory traffic, and like the 1953 traffic sample, which was the subject of the Transcontinental lines' cost study, shows the Official Territory portion of revenue received under existing divisions as settled as 21.8 percent, (321 I.C.C. at 47; 322 I.C.C. at 507): In finding that its results support the soundness of its judgment based on the Transcontinental lines' study, the Commission, in its administrative judgment, regarded the 319-car study as representative. (322 I.C.C. at 507)

(j) Under the issues stated by the parties, none of them has challenged the prescribed divisions as producing as to it a confiscatory result.

Findings re Issue No. 5

32. None of the approximately 350 common carriers by railroad which were parties to the proceedings before the Commission requested the Commission, in its prescription of divisions, to accord it special consideration on the ground of financial weakness. Most of the individual carriers in the proceedings before the Commission joined in the presentation and submission of the issues as controversies between contending groups of carriers, and not as controversies involving the divisions of individual carriers; and no individual carrier objected to that method of presentation and submission.

[fol. 1665] 33. The divisions prescribed by the Commission for all hauls in Official Territory, for all hauls in Mountain-Pacific Territory, and for most hauls in Midwestern Territory apply whether the service is performed by one carrier or by two or more carriers. The only subdivisions which the Commission prescribed are subdivisions in Midwestern Territory on intraterritorial traffic interchanged in Midwestern Territory between complaining Midwestern lines and defendants in their respective complaints. It has not been the administrative practice of the Commission in interterritorial divisions cases to make findings showing the amounts of revenue required by each of the individual participating carriers or the financial effect of the divisions being prescribed upon such individual carriers. (322 I.C.C. at 500-1)

(a) The Transcontinental lines, including the Denver & Rio Grande Western Railroad, submitted 30 pages of requested findings to the Commission, but none of them contained any suggestion that the Commission must or should make a finding of the amounts of revenue required by in-

dividual carriers or the financial effect of the divisions being prescribed upon such carriers. (Appendix to Brief of Mountain-Pacific Lines dated June 13, 1960, pp. 156-85; Exceptions of Mountain-Pacific Railroads to Recommended Report dated April 5, 1961, p. 148)

(b) Before the Commission, the Katy and the Frisco joined with other Midwestern lines in a reply to exceptions of other parties which stated:

> "The important question here is not the range or amount of the percentages of increase or reduction recommended by the Examiners for the several groups of carriers, but whether the Examiners have recommended divisions which are just, reasonable, and equitable. In a divisions case the objective of the Commission is 'to establish a basis of divisions in line with the evidence, whatever the revenue results might [fol. 1666] prove to be.' *Divisions of Freight Rates*, 156 I.C.C. 94, 95." (Reply of Midwestern Complainants to Exceptions of Opposing Parties dated May 29, 1961, p. 149)

(c) In the proceedings before the Commission, the Transcontinental lines, including the Denver & Rio Grande Western, stated in their opening brief:

> "There is no justification for determining in this proceeding internal divisions within the Mountain-Pacific group of lines (Exhibit T-303, p. 13). Apart from the Commission's lack of jurisdiction over such divisions under the pleadings, the Midwestern lines' only legitimate interest in these proceedings is to obtain fair divisions for their own lines in their own territory, not to concern themselves over divisions within another territory." (Brief of Mountain-Pacific Railroads dated June 13, 1960, p. 277)

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(d) In their reply to exceptions, the Transcontinental lines, including the Denver & Rio Grande Western, stated:

"* * * there is no basis under the pleadings or the record in these proceedings for a prescription of divisions between Mountain-Pacific lines serving gateways in the middle of Mountain-Pacific Territory (Exhibit T-303, p. 13)." (Reply of Mountain-Pacific Railroads to Exceptions of Official Lines and Midwestern Lines dated May 29, 1961, p. 38)

34. The Column 1 and the Column 2 scales of divisional factors prescribed for Midwestern Territory apply for movements over all lines in that territory, some of which are parallel to those of the Katy and the Frisco. The Column 3 scale of divisional factors prescribed for hauls in Mountain-Pacific Territory (which is 10 percent higher than the Column 1 scale) applies for movements over the Denver & Rio Grande Western, as well as for hauls of other Transcontinental lines.

35. The Denver & Rio Grande Western, whose lines [fol. 1667] extend between the Colorado Junctions (principally Denver and Pueblo) and the Utah Junctions (Ogden and Salt Lake City), is a link in Transcontinental routes which are competitive with routes embracing the lines of the Union Pacific between the Missouri River and the Utah Junctions. In the proceedings before the Commission, the Transcontinental lines, including the Denver & Rio Grande Western, opposed efforts of the Midwestern lines to have divisions prescribed over the Utah Junctions. In their reply to exceptions, the Transcontinental lines, including the Denver & Rio Grande Western, stated:

"* * * it is plain that the pleadings in this proceeding do not bring into issue the divisions over Utah gateways."

* * * * * * *

"Any legitimate concern the Midwestern lines may have in any threat to the equalization of divisions over Utah gateways is premature. If any problems

arise as to equalization of divisions over those gateways on a fair and equitable basis, they can be considered in the negotiations contemplated in the recommended Report. If agreement can be reached as to any equalization involving divisions not here in issue, any related modification of the prescribed divisions to conform to the agreed equalization can be requested by joint petition." (Reply of Mountain-Pacific Railroads to Exceptions of Official Lines and Midwestern Lines dated May 29, 1961, pp. 38, 39)

(a) The Commission found that its decision leaves the competitive problem as between routes embracing the Denver & Rio Grande Western and routes embracing the Union Pacific precisely where the Transcontinental lines insisted that it be left. (322 I.C.C. at 510)

(b) The orders of the Commission permit the Denver & Rio Grande, the Union Pacific, and other carriers participating in competitive routes to establish by agreement percentages other than those determined by use of the prescribed scales for the purpose of equalizing competing [fol. 1668] routes or gateways. (321 I.C.C. at 86; 322 I.C.C. at 526)

Findings re Issue No. 6

36. Concerning this issue, Transcontinental lines in effect contend that, as to each of the 75 divisional percentages prescribed between the five Eastern and five Western territorial groups via the three principal primary dividing points or gateways, the Commission was required by the first clause in the last sentence of Section 8(b) of the Administrative Procedure Act, as a prerequisite to the making of a valid order, to make findings explaining to what extent they severally reflected each of the several standards specified and embraced in Section 15(6) of the Interstate Commerce Act as matters for "due consideration," such as relative costs and revenue needs.

37. The findings made by the Commission which have a bearing upon the fairness, as between the Eastern and Western carrier groups, of the percentages prescribed as primary East-West divisions of the Official-Transcontinental rates, as a whole and individually, include among others findings to the following effect:

(a) "* * * the [Eastern] complainants perform approximately 23 percent of the total service, measured by short-line ton-miles." (321 I.C.C. at 21)

(b) "The great majority of cars included in the studies were interchanged between eastern and western lines at Chicago, Ill., St. Louis, Mo. (including East St. Louis, Ill.), and Peoria, Ill. The Chicago interchange was over 60 percent and as much as 64 percent, including certain other junctions in the Chicago area. That at St. Louis was at least 18 percent and at Peoria 3 percent (increased to 7 percent with the addition of other interior Illinois cities). About 2.6 percent moved by car ferry across Lake Michigan." (321 I.C.C. at 23)

(c) "About 27 percent of the traffic received a one-line haul west of the interchange points. Principally, these [fol. 1669] were movements over the AT&SF and the CMStP&P, but it appears logical also here to take account of the CB&Q, a subsidiary of the GN and the NP, and the StLSW and the T&NO, which are parts of the SP system." (321 I.C.C. at 23)

(d) "The movements to and from the subdivisions of eastern territory were represented by the following percentages of total tons: central, 55.1; trunkline, 35.5; New England, 9.4. The revenue percentages were about the same. From the defendants' 1953 study it appears that about 36 percent of the cars originated or terminated in the metropolitan districts of the four major Pacific ports: Seattle, Wash., Portland, Oreg., and San Francisco and Los Angeles, Calif." (321 I.C.C. at 23)

(e) The present basic group percentages east of Chicago, Peoria, and St. Louis for the New England-seaboard, Trunkline interior, Bessemer, Buffalo-Pittsburgh, and the northern and southern Cincinnati-Detroit groups are shown in the Commission's report and in Appendix A hereto. These basic group divisions are subject to certain exceptions which on particular traffic accord Eastern lines somewhat greater proportions. (321 I.C.C. at 26-27)

(f) Following a careful and detailed examination and consideration of the cost evidence adduced by the Transcontinental lines (321 I.C.C. at 29-47), the Commission, with respect to the Official-Mountain Pacific traffic, found that the Eastern lines received 21.8 percent of the total revenue as settled, and bore 26.1 percent of the total costs of service as based on the Transcontinental cost study as restated by the Commission, and 26.7 percent of such total costs computed on the Rail Form A formula (321 I.C.C. at 47, 49). Concerning these two bases the Commission found (321 I.C.C. at 50):

"One substantiates the other, and supports the view that, for a large and varied body of traffic as here, territorial average costs will be the substantial equivalent of specific costs."

Further the Commission found (321 I.C.C. at 50):

[fol. 1670] "The above cost evidence shows that for the official-mountain-Pacific traffic * * * the official lines received from 4.3 to 4.9 percentage points less than their proportion of the cost of furnishing the service."

(g) "None of the contending groups is urging that divisions to be prescribed should rest solely on ascertained costs of service." (321 I.C.C. at 51)

(h) "It is worthy of note that the [Transcontinental] defendant's suggested divisional scales said by them to reflect actual costs without consideration of revenue needs applied in the manner which they outline would increase

many of the most important present divisions. The eastern division between Pittsburgh and the Pacific ports via St. Louis, for example, would be increased from 20 to 25 percent. [This was the percentage prescribed by the Commission. 321 I.C.C. at 83; 322 I.C.C. at 523] The eastern division between Detroit and the Pacific ports via Chicago would be raised from 13 to 15 percent." (321 I.C.C. at 52)

(i) Concerning the factor of revenue needs the Commission, in its initial report, examined and discussed at length the extensive evidence of record on that subject. This dealt, among others, with changes in economic conditions in the respective territories since the present divisional basis was established, the effect thereof on railroad operating and revenue results, and present needs for increased revenues. (321 I.C.C. at 53, 67). Following its review and discussion of the evidence of revenue needs, the Commission found (321 I.C.C. at 67):

"Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a consider- [fol. 1671] ably more favorable condition than the eastern railroads."

(j) In addition to the indicated findings made by the Commission in respect of relative costs and revenue needs, it made further findings on those subjects in the concluding portion of its initial report (321 I.C.C. at 67-78) which include the following (321 I.C.C. at 70):

"From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the [Transcontinental] defendants to an extent not justified by ascertainable cost differ-

ences. The evidence, however, does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need."

* * * * * * *

"Nothing in the nature of a mathematical formula to measure such need exists."

(k) As a further conclusion on the subject of revenue needs, the Commission in its initial report found (321 I.C.C. at 71):

"From 1947 to 1958 the intraterritorial carload traffic of the railroads in official territory declined 36 percent, and the reduction in their interterritorial traffic in the same period was only 18 percent. In 1958 the latter traffic was 23 percent of the total, compared with 19 percent in 1947. It thus appears that the eastern roads no longer have available to them the profitable volume of freight originating within their own territorial borders which in past years caused them to be generally regarded as the strongest group of all American railroads. For this reason and others the transportation and economic conditions affecting the eastern and western railroads are far different from those which prevailed 75 years ago when this divisional structure was taking shape. Under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition (*New England Divisions, supra*), we believe that there should be increases in the [Eastern] complainants' divisions reflecting revenue need as well as [fol. 1672] cost."

(l) Relating more specifically to the prescribed interterritorial East-West primary divisions, the Commission in its initial report found (321 I.C.C. at 72-73):

"*Interterritorial divisions.*—Throughout these proceedings the parties have considered it likely that any prescribed

readjustments would be based on the use of divisional scales, popularly known as integer scales, which have been employed in some other decisions dealing with interterritorial divisions in the past 30 years. Although the complainants proposed no specific scheme of divisional factors, they express a preference for some form of scales on the ground that 'this method permits definiteness of prescription and consequent earlier effectiveness of the Commission's requirements.'"

* * * * * * *

"The transcontinental class and commodity rates, applying over maximum distances between the East and West, however, are broadly grouped in both territories. We therefore see no practical reason for divisions reflecting 50-mile blocks for interterritorial application, which might prove to be inconsistent with the rate grouping. Accordingly we agree on this point with the [Transcontinental] defendants, who are opposed to the use of divisional scales for a number of reasons, and say 'that the present group basis of publishing transcontinental divisions is highly desirable in the light of competitive conditions affecting the routing of transcontinental traffic.'"

(m). Still more specifically with regard to the divisional group percentages prescribed on the Eastern Transcontinental traffic the Commission in its initial report found (321 I.C.C. at 73-74):

"In appendix B, therefore, we have provided specific primary divisions for application east and west of the principal interchange points between defined groups in eastern and transcontinental territory. The eastern divisions there shown are higher than the present percentages [fol. 1673] in recognition of the evidence relating to cost and revenue need previously discussed herein.

"In this regard, for example, the Seaboard-New England and the Pittsburgh groups and the Pacific coast and Spokane-Reno groups via Chicago are representative. The

present division from the Seaboard-New England group to the Pacific coast group is 27.5 percent and the new division is 34 percent, which represents an increase of 24 percent; from the Pittsburgh group to the Pacific coast group the present division is 16.5 percent and the new division is 22 percent, representing an increase of 33 percent. From the Seaboard-New England to the Spokane-Reno group the present division is 27.5 percent and the new division is 38 percent, amounting to a 38-percent increase, whereas from Pittsburgh to the Spokane-Reno group the present division is 16.5 percent and the new division is 24 percent, which is approximately a 45-percent increase.

"It is our best judgment that the eastern carriers' divisions between the above-named groups should be increased as shown, based on the evidence herein relating to cost and revenue need. The increases in the eastern divisions to and from the interior western groups are necessarily greater than those to and from the Pacific ports as our findings provide for three groups in transcontinental territory in substitution for the single group in effect today."

(n) Concerning the primary dividing points or gateways for which the prescribed East-West divisions on Official-Transcontinental traffic were fixed, the Commission in its initial report found in part (321 I.C.C. at 75):

"*Interchange points*—Differences of opinion concerning interchange or dividing points are slight. Since the great majority of the traffic to and from the East moves through Chicago, Peoria, or St. Louis, it is generally agreed that those cities should be the principal dividing points. In addition, we have provided for the use of Mackinaw City, Mich., and for Kewaunee, Wis., the latter being represen-[fol. 1674] tative for cross-lake routes.

"There are a number of interchange points in Illinois which are now grouped with Chicago, Peoria, or East St. Louis, as the case may be. No dissatisfaction with that grouping has been expressed, and it may properly be ob-

served in the application of divisions over the three major dividing points."

(o) The specific primary divisional group percentages prescribed are those set forth in Appendix B of the Commission's initial report (321 I.C.C. at 82-84) and in Appendix B-1 of its supplemental report (322 I.C.C. at 521-524) and are those there found by the Commission to be just, reasonable, and equitable. (321 I.C.C. at 78, Finding 2; 322 I.C.C. at 526, Finding 4).

38. In their petition for reconsideration of the Commission's original order the Transcontinental lines made the point essentially raised by this issue. Thus, at page 128 thereof (PR 378), they asserted that—

> "The report does not attempt to correlate the newly prescribed divisions with any findings representing relative costs or relative needs."

and particularly contended that the divisions prescribed for the Detroit-Indianapolis (E-4) and Pittsburgh (E-3) divisional groups were excessive. Following its reconsideration, the Commission made its supplemental report and order of December 31, 1963 (322 I.C.C. 491) in which, in response to these criticisms of the Transcontinental lines, the Commission made certain corrections in its original prescription of the East-West primary divisions. Among the changes so made were reductions of 1 percentage point in the Eastern percentages of joint rates between Groups E-1 and W-2 via Chicago, between Groups E-1 and W-3 via Peoria, and between Groups E-2 and W-2 via Chicago. In this connection the Commission found (322 I.C.C. at 510):

> "The [Transcontinental] defendants point out cer- [fol. 1675] tain minor inconsistencies in the divisions prescribed between eastern groups E-1 and E-2 and western groups W-2 and W-3. Their criticism is sound,

and the correction has been made in appendix B-1 infra. They complain of ambiguity because interchange or dividing points in northern Illinois now grouped with either Chicago or Peoria were not specifically named in our report. We there stated that no dissatisfaction with the present grouping has been expressed. The evidence indicated that Springfield and Bloomington, Ill., are now grouped with Peoria in dividing rates, but other groupings of the northern Illinois junctions were not disclosed and were therefore not specified in our report. The situation is of more immediate interest to the eastern and the midwestern complainants, which apparently consider it unimportant. The defendants say that 'as to cross-lake routes other than Mackinaw City and Kewaunee, there is doubt as to which percent should be applied.' It was made clear in our report that throughout the proceedings the name Kewaunee has been regarded as a designation of all west-bank Lake Michigan car ferry terminals."

39. The Commission gave consideration to the percentage divisions recommended by the Examiners, and to the responses of the parties thereto, and made the following finding in its supplemental report (322 I.C.C. at 507-8):

"Upon consideration of this and other evidence of relative costs and revenue needs we concluded that the divisions recommended by the examiners on official-transcontinental traffic failed to do justice to the eastern complainants. The prescribed divisions followed the same general plan as those which were recommended in that they were based on present groups in the East and were 15 percent for the westernmost Illinois group (E-5)."

40. Concerning the Transcontinental lines' contention [fol. 1676] that the Commission's reports do not contain

findings explaining the extent to which, in fixing the particular primary group percentage divisions on the interterritorial traffic, it was influenced by factors to which consideration is to be given under Section 15(6) of the Interstate Commerce Act, the Commission did not find it consonant to employ as a rigid guide any single standard, or any specific formula for combining the several standards, comprehended by Section 15(6) of the Interstate Commerce Act. It found (322 I.C.C. at 507):

> "In determining just, reasonable, and equitable divisions herein, the process we employed was one of practical judgment and not of mere mathematical computation. We found it impossible to use any existing divisional scale, a cost scale, or any method suggested by the parties as an exclusive guide or specific pattern for the divisions to be prescribed. In our view of what the evidence shows as to the equities of the situation, we necessarily had to exercise our judgment. For example, the cost evidence indicated that the present divisions gave the eastern carriers a smaller margin of revenue above out-of-pocket costs than those of the western carriers. The evidence concerning financial and traffic statistics also disclosed that the trend in the earning power of the eastern roads as freight carriers since the end of World War II has been much less favorable than that of the western roads. Comparison of net railway operating income from all services, however, does not fully show that trend for the reason that the passenger operating ratios of the western roads in this period increased to a much greater extent than those of the eastern carriers. All of these elements, in our judgment, warranted an increase in the divisions of the eastern carriers, and appendix B was formulated with that objective in mind."

[fol. 1677]

Findings re Issue No. 7

41. In addition to its ultimate finding that the Eastern division of joint rates between the Southeastern Illinois group (E-5) and Western groups (W-1 and W-2) shall be 15 percent and will be just, reasonable and equitable (321 I.C.C. at 78, 84; 322 I.C.C. at 520, 524), the Commission's reports contain the following findings on this subject (321 I.C.C. at 74-75):

> "Our findings provide for a defined group of Illinois points principally served by eastern and southern railroads, as well as some western lines, and including also Evansville, Vincennes, and Terre Haute, Ind., which are on or near the Illinois-Indiana boundary. (The complainants would prefer the exclusion of the Indiana points.) The defendants strongly object to the proposal in the recommended report of a uniform minimum division of 15 percent for the terminal lines serving this proposed southeastern Illinois group in lieu of present divisions said to range from 6 to 12 percent. Both in many divisional bases voluntarily established in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent. The increasingly burdensome terminal costs in recent years are persuasive that a 15 percent minimum is justified."

(a) In its supplemental report, adverting to the Examiners' recommendations—which included a 15 percent minimum division on traffic moving between the Southeastern Illinois group and the Pacific Coast and Spokane groups (PR 236)—the Commission made the following finding (322 I.C.C. at 507-8):

> "Upon consideration of this and other evidence of relative costs and revenue needs we concluded that the

divisions recommended by the examiners on official-transcontinental traffic failed to do justice to the eastern coinplainants. The prescribed divisions followed [fol. 1678] the same general plan as those which were recommended in that they were based on present groups in the East and were 15 percent for the westernmost Illinois group (E-5)."

42. The record contains evidence concerning the increasingly burdensome terminal costs in recent years. Exhibit E-700, page 1, sets forth Rail Form A terminal and line-haul unit costs for 16 tons in refrigerator cars and 27.7 tons in box cars (which weights are those representative of the eastbound fruit and vegetable traffic and all other traffic, respectively) for a series of years beginning with 1939 and ending with 1957. Making comparison of the box car costs, which are illustrative, the relative percentages of increase in the separate terminal and line-haul unit costs may be computed (as was done in Eastern lines' brief before the Commission) as follows (EPR 142).

Fully Distributed Box Car Costs

	Eastern District	Percent of 1939	Western District	Percent of 1939
Year 1939				
Terminal	2.6¢	100.00	2.9¢	100.0
Line Haul ..	0.038010	100.00	0.37240	100.0
Year 1948				
Terminal	3.7	132.3	3.7	127.6
Line Haul ..	0.050297	132.3	0.043916	117.9
Year 1957				
Terminal	6.5	250.0	6.0	206.9
Line Haul ..	0.063661	167.5	0.052066	139.8

The comparison discloses that over the years, and particularly in later years, terminal costs have tended to in- [fol. 1679] crease much faster than line-haul costs. It is

obvious, however, from the Commission's finding with reference to "increasingly burdensome terminal costs in recent years" that its conclusion was not rested alone on comparisons such as the foregoing, but represents a generally recognized condition.

43. There was evidence before the Commission that "terminal costs" were not confined to those so assigned under the Rail Form A formula, but included other costs unrelated to lengths of haul:

(a) Witness Mintz (Exhibit MW-439, pp. 18-19) testified that—

"A minimum primary division should not only cover terminal expenses of the originating or delivering carrier, but should also cover other expenses that have no relation to length of haul."

(b) Costs of a terminal character, in that they have no relation to length of haul, include expenses incurred in the extensive intermediate switching incident to interchange through the large terminal areas of such primary breakpoints as Chicago, St. Louis-East St. Louis, and Peoria. Witness Butler testified (Exhibit E-487, p. 35) that on westbound traffic interchanged at Chicago the Eastern lines absorb the intermediate switching charges of the belt lines to effect delivery to the Western lines, and in many instances their revenue for the shorter Eastern hauls is but slightly more than the amount of the intermediate switching charges (E.P.R. 505). On the same subject this witness testified further (Exhibit E-487, p. 36; E.P.R. 506):

"Under the present arrangement the Western lines pay the charges necessary to effect delivery at East St. Louis-St. Louis on both received and delivered traffic to and from Transcontinental territory. The Eastern railroads have proposed that the delivering line assume that expense, which means on westbound traffic they would pay the

intermediate charges necessary to effect delivery to the Western lines at East St. Louis or St. Louis."

(c) Concerning this proposal the Commission found (321 [fol. 1680] I.C.C. at 75-76):

"Traffic which is interchanged between eastern and western railroads at St. Louis or East St. Louis generally requires the service of an intermediate terminal rail or motor carrier for the river crossing. At present the cost of that service on transcontinental traffic is borne by the western lines on both eastbound and westbound shipments. The same arrangement formerly prevailed on all interterritorial traffic at St. Louis, but as result of the decisions of the Commission relating to divisions of rates between official territory, on the one hand, and southwestern and western trunkline territories, on the other hand, the eastern lines pay intermediate charges on westbound shipments to those territories and the western lines pay them on eastbound freight. It is generally agreed by the parties that this arrangement should be extended to transcontinental shipments."

(d) In his exhibit (E-487, pp. 35-37, Appendix F; EPR 505-515) Witness Butler showed that on Eastern lines' short-haul traffic via Chicago and St. Louis their revenues would be most inadequate and unfairly low if divisions were prescribed on Transcontinental lines' theory of making primary East-West divisions with rigid reference to Rail Form A cost scale relationship as between terminal and line-haul factors.

(e) The record also contains evidence to show what would be the revenue results to the Chicago and Eastern Illinois Railroad on fresh fruit and vegetable traffic from California if handled by it from East St. Louis to Chicago for delivery at the Chicago Produce Terminal (Exhibit E-20, EPR 421-424; Exhibit E-487, Appendix G, EPR 516-517). In many instances it would suffer a deficit under

present divisions, and for this reason does not solicit this traffic (Exhibit E-20, p. 2, EPR 422). Under the order of the Commission Chicago is not within Group E-5, but the comparisons illustrate the need, where (as on fresh fruits and vegetables) the level of rates is low and heavy terminal [fol. 1681] and interchange expense at primary breakpoints must be borne, for a minimum division adequate to protect the short-haul carrier.

44. Concerning the finding of the Commission (321 I.C.C. 74-75) that—

> "Both in many divisional bases voluntarily established in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent,"

the record included the following evidence:

(a) There are two examples of record of establishment of a 15 percent minimum division by voluntary action of the carriers. Witness Mintz, in disagreeing with the statement of a Transcontinental witness that "the purpose of the minimum division is to compensate for the terminal services of an initial carrier under a divisional arrangement based on mileage alone", stated (Exhibit MW-439, p. 18):

> "Provisions for minimum divisions are found in many division sheets covering divisions voluntarily established by the carriers as well as in decisions of the Commission. One of these division sheets is WTL Division Sheet 500-A, which is referred to on page 3 of Mr. Stilling's Exhibit T-304. As is shown on that page, that division sheet provides for a minimum division of 15 percent in addition to containing an inflation of 120 miles as a terminal element. Division Sheet 500-A is still in effect on traffic originating or terminating on the Santa Fe, Union Pacific, Great

Northern, Northern Pacific, Denver and Rio Grande Western, and Chicago, Burlington & Quincy."

The second example of establishment of a 15 percent minimum division by voluntary carrier action was noted in the testimony of Witness Mintz (Exhibit MW-139, p. 17), [fol. 1682] and related to the settlement of October 4, 1955, respecting divisions on Official-Western Trunk Line traffic (Exhibit E-62, p. 2).

(b) Examples of the Commission's prescription of a 15 percent minimum division were cited by Witness Butler (Exhibit E-487, p. 37, EPR 507) as including the following cases: *Official-Western Trunk Line Divisions,* 269 I.C.C. 765, 786; *Official-Southern Divisions,* 287 I.C.C. 497, 547; *Official-Southwestern Divisions,* 287 I.C.C. 553, 597. It was stipulated that decisions of the Commission referred to by any witness would be considered as incorporated into the record by reference. The stipulation provides that where reference is made to a decision in a proceeding in which more than one report was issued, all reports would be considered as incorporated by reference. (Transcript before I.C.C., pp. 3590-81, 3599-3600)

Findings re Issue No. 8

45. The Transcontinental lines, the Katy, and the Frisco claim the record is deficient in typical evidence with respect to certain divisions. The Transcontinental lines claim there is no typical evidence with respect to individual rates and divisions to support the 22 percentage divisions prescribed for traffic (a) between points in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Peoria and St. Louis, and (b) between points in Group E-5 (Southeastern Illinois) in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Chicago. The Katy and the Frisco claim that the record is deficient in typical evidence with respect to individual

rates and divisions to support the prescribed divisions over routes embracing their respective lines.

46. (a) In the proceedings before the Commission, after the record was closed, the Transcontinental lines represented to that tribunal that "the contesting parties compiled the large exhaustive record which they believed necessary to a proper determination of the issues under the standards of Section 15(6) of the Act and the precedents [fol. 1683] of the Commission and the courts," and that "This divisions case should be decided on the basis of the ample record now before the Commission." (Exceptions of Mountain-Pacific Railroads to Recommended Report dated April 5, 1961, pp. 2, 33)

(b) The record contains a representative showing of divisions on traffic between points in Montana and the East via the Twin Cities and Chicago. These include both general divisions and divisions of rates on particular commodities. Concerning these divisions, as contained in his Exhibit MW-199 (see pp. 2, 3, 11-15, 21), Witness Mintz, in Exhibit MW-197, page 2, testified:

> "The purpose of this exhibit [MW-199] is to present a representative picture of the divisional situation at and to stations in Montana and I believe the exhibit does this."

(c) The witness further testified (Exhibit MW-197, p. 7):

> "Between stations in Montana and stations in eastern territory, no general percents are in effect, except where the Spokane rate is applied. Where the Spokane rate is observed, the general percents as published in Central Territory Railroad DS No. 136 apply. Divisions are in effect covering rates on certain commodities, which divisions have been mutually agreed upon by the interested carriers. No one particular basis or formula has been followed in reaching these agreements. Each of such division agreements was arrived

at separately. On class-rated traffic and column-rated traffic, that is where the rates are made direct percents of the class rates, *the divisions have been in dispute* between the eastern and western carriers since May, 1940, the effective date of the Commission-Prescribed class and column rates between stations in Montana and eastern territory, I.C.C. Docket No. 27423 (226 I.C.C. 467 and 235 I.C.C. 459). Prior to the establishment of the rates prescribed by the Commission and rates related thereto, the Spokane rates were quite generally applicable. In dividing the present class and [fol. 1684] column rates, the eastern carriers contend, on carload traffic, that the percents should be based on the WTL DS 500-A formula, and the Montana lines contend that the percents shown in Central Territory Railroads DS No. 136 should apply. Due to this *pending dispute* the present general percents shown in Exhibit No. MW-199 (HAM-24) between stations in Montana and stations in eastern territory reflect the *contention of both groups* (see pages 2 and 3)." (Emphasis supplied).

(d) Rates and divisions on ores and concentrates and smelter products from Montana origins to eastern destinations are contained in Exhibit MW-211, and divisions of rates on lumber from Missoula and Libby, Montana, via Minnesota Transfer and Chicago and East St. Louis, with distances, are shown in Exhibit MW-216.

(e) The record also contained a showing of the divisions of rates between representative points in Official Territory and representative points in Transcontinental Territory west of Montana (e.g., Spokane, Wash.) over routes via Chicago and the Twin Cities, Peoria and the Twin Cities, and St. Louis and the Twin Cities. The foregoing evidence indicated the gateway relationships of divisions of Transcontinental rates as between the Chicago, Peoria and St. Louis gateways. Also the record contained a

showing of the divisions of rates (1) between Indianapolis, Ind., a point immediately east of Group E-5, and representative points in Montana over routes via Chicago and the Twin Cities, and (2) between Chicago, Peoria and St. Louis; points adjoining the western border of Group E-5, and representative points in Montana over routes via the Twin Cities. (Exhibits MW-193, MW-194, MW-197, MW-199, MW-724-25). The record contains a vast amount of evidence of rates and divisions on the Eastern traffic generally (see exhibits cited and described in Appendix B of the Eastern brief herein). This included much data showing shipments to or from numerous stations which will be in Group E-5 and the short-line distances thereto from Chicago and East St. Louis, and in some instances from [fol. 1685] both, which in combination with similar data (Exhibit E-487, Appendix F) between Montana points and those gateways the Commission could readily construct divisions consistently related to those fixed for the other Eastern groups.

(f) The 319 car study (Exhibit MW-132) contained only four shipments moving between Montana groups W-4 and W-5, and all five Eastern groups. (Appendix A to Plaintiffs' Reply Brief) This would represent only 1.25 percent of the total Official-Transcontinental traffic.

(g) With respect to the Montana divisions, the Commission found (321 I.C.C. at 29):

> "The divisions of joint rates to and from Montana points via northern gateways do not conform to any uniform pattern, and in some instances the general basis is in dispute. It is therefore not feasible to describe them here in a helpful manner."

47. (a) The claim of the Katy and the Frisco in this Court that the record is deficient in typical evidence with respect to rates and divisions over routes embracing their respective lines was not presented by the Katy or the Frisco

to the Commission in their petition for modification or reconsideration, or otherwise.

(b) In the proceedings before the Commission, the Katy and the Frisco joined with other Midwestern lines in a reply to exceptions of other parties in which the following representations were made to the Commission:

> "The record in these proceedings is without doubt more comprehensive and informative than any record which the Commission has heretofore had before it in any interterritorial divisions case. In the words of Transcontinental counsel, 'the contesting parties compiled the large exhaustive record which they believed necessary to a proper determination of the issues under the standards of Section 15(6) of the Act and the precedents of the Commission and the courts.' (Defs' Exceptions 2)
>
> [fol. 1686] "Included in the record here before the Commission are:
>
> 1. Five general traffic studies and various other traffic studies (MW Brief 42-50);
>
> 2. An illuminating history of the Transcontinental divisions (MW Brief 29-42);
>
> 3. A showing of the present divisions between representative points throughout the three territories, together with the mileages and the routes over which the divisions apply (MW Brief 17-29);
>
> 4. Comparisons of the present divisions with the divisions under Commission-prescribed yardsticks and other formulas (MW Brief 90-106; 540-42; 561-71; 582-87);
>
> 5. Evidence with respect to economic conditions, including the changes which have taken place in Mountain Pacific Territory (MW Brief 106-14);
>
> 6. Evidence of operating conditions in the three territories (MW Brief 114-42);

7. General and special studies with respect to relative cost of service by territories and by groups of railroads (MW Brief 180-382);

8. Evidence with respect to revenue needs (MW Brief 382-539); and

9. A showing of the commodity, route, type of car, weight, total revenue, and divisions of revenue as made and as they would be under several formulas with respect to 621 individual carload movements selected by a sampling method from the Midwestern Complainants' one percent traffic study for 1953. (MW-132-34; MW-143; MW-186-87)

"The showing of the present divisions, the mileages and routes appertaining thereto, and the divisions under formulas used for comparison embraces literally many thousands of divisions. (MW-64-74; MW-75; MW-101; MW-189-99; MW-205-11; MW-213-16; MW [fol. 1687] Brief, Apps. II-A, II-B, II-E; MW Exceptions, Apps. 3-4) The suggestion of [the Transcontinental] Defendants that the record in these proceedings does not conform to the rule of the Abilene case is not embodied in a specific exception, and is wholly without foundation." (Reply of Midwestern Complainants to Exceptions of Opposing Parties dated May 29, 1961, pp. 139-40)

(c) The record before the Commission included a comprehensive showing of divisions of rates between representative points in Official and Midwestern Territories, and representative points in Transcontinental Territory. This showing embraced many thousands of divisions of rates applicable over numerous routes in and through Midwestern Territory, including routes via the Katy and the Frisco. (Exhibits MW-64-75, MW-101, MW-189-99, MW-205-11, MW-213-16) Included in this showing were exhibits relating to a 621-car sample of carload shipments presented as

representative by the Midwestern lines, including the Katy and the Frisco, of which 319 moved between Official and Transcontinental Territories and 302 between Midwestern and Transcontinental Territories. The showing with respect to these 621 individual carload movements included the names of the participating carriers, the points of interchange, the weight, the commodity, the type of car, the freight charges, the divisions of revenue as settled under the present basis of divisions, the divisions of revenue as they would be under several divisional formulas, and pertinent distances. Of the 319 Official-Transcontinental shipments, 19 moved via the Katy or the Frisco; and of the 302 Midwestern-Transcontinental shipments, 48 moved via the Katy or the Frisco. (Exhibits MW-132-34, MW-143, MW-186-87)

Findings re Issues Nos. 9-11

48. The Commission made a number of findings with respect to the scales of divisional factors prescribed for [fol. 1688] application in Midwestern and Mountain-Pacific Territories. Among other things, the Commission in its initial report found that the divisions prescribed "must reflect certain broader aspects of revenue need," and that "Nothing in the nature of a mathematical formula to measure such need exists." (321 I.C.C. at 70) In its supplemental report, the Commission stated that the Transcontinental lines had incorrectly assumed that the construction of a divisional scale "is primarily a matter of costs and mathematics," and that the process the Commission had employed in determining just, reasonable, and equitable divisions "was one of practical judgment and not of mere mathematical computation." (322 I.C.C. at 507) The Commission further found that the divisional scales prescribed should be structured to some extent on the basis of rate scales and not cost scales. (322 I.C.C. at 508-9)

49. A divisional scale, like a rate scale, has a starting point and spreads between the mileage blocks. Unless the

scale is based on costs, the starting point necessarily reflects elements or factors which are not subject to quantitative measurement.

50. Although broad territorial groups are now employed in connection with the divisions of rates between Midwestern Territory and Transcontinental Territory, the Commission found that these groups are less well defined than those on which the Official-Transcontinental divisions were based, and that in a number of instances they appeared not to be properly related to distance. (321 I.C.C. at 76; 322 I.C.C. at 506) The Commission found that "divisional scales afford an appropriate means of readjusting the intraterritorial divisions." (321 I.C.C. at 76) A scale suggested by the Midwestern lines and scales suggested by a witness for the Transcontinental lines were discussed, and the Commission found it was impossible to use them as an exclusive guide or specific pattern. (321 I.C.C. at 51-52, 73, 76-77; 322 I.C.C. at 507, 514)

51. The intraterritorial divisions were prescribed by the [fol. 1689] Commission for application in Western Territory, and are to be determined by the use of scales of divisional factors which (with adjustments to conform to the evidence in the instant proceedings) reflect the Docket 29886 scale of divisional factors prescribed in *Official-Southwestern Divisions,* 287 I.C.C. 553, 595 (1953), for dividing joint rates between points in Official Territory and points in Southwestern Territory, which is generally the area also known as Midwest-Southwest Territory. (321 I.C.C. at 76-77; 322 I.C.C. at 508) Three scales of divisional factors (Columns 1, 2 and 3) were prescribed, all of them in 50-mile blocks.

(a) The Column 1 scale, which is the 29886 basic scale, was prescribed for service in Midwestern Territory on traffic which is either originated or terminated therein. The Column 2 scale was prescribed for intermediate service in Midwestern Territory; and is the same as that prescribed

for intermediate service in *Official-Southwestern Divisions, supra.* The Column 3 scale was prescribed for service in Mountain-Pacific Territory on traffic which is either originated or terminated in that territory, and the integers in that scale were made 10 percent higher than the integers in the Column 1 scale. The Commission also provided that the carriers may, if they so agree, establish percentages other than those determined by the used of the prescribed scales for the purpose of grouping or of equalizing competing routes or gateways. (321 I.C.C. at 77, 85-86; 322 I.C.C. at 508-9, 525-26)

(b) On Midwestern-Transcontinental traffic, the Column 1 scale and the Column 3 scale were prescribed for the determination of primary divisions covering, respectively, hauls in Midwestern Territory and hauls in Mountain-Pacific Territory; and the Column 1 scale and the Column 2 scale were prescribed for the determination of subdivisions of the primary divisions in Midwestern Territory on shipments interchanged between complaining Midwestern lines and defendants in their respective complaints at points in Midwestern Territory.

[fol. 1690] (c) On Official-Transcontinental traffic, the Column 2 scale and the Column 3 scale were prescribed for the determination, respectively, of the Midwestern subdivisions and the Mountain-Pacific subdivisions of the Western Territory primary divisions; and the Column 2 scale was prescribed for subdividing the Midwestern portion of the revenue on shipments interchanged between complaining Midwestern lines and defendants in their respective complaints at points in Midwestern Territory. (321 I.C.C. at 85-86; 322 I.C.C. at 525-26)

(d) In its reports, the Commission also discussed miscellaneous revisions of the present divisions on Midwestern-Transcontinental traffic suggested by parties or groups of parties as to which no issue is raised in this Court. Some of these suggestions were adopted and other were

rejected. (321 I.C.C. at 77-78, 86-87; 322 I.C.C. at 509-10, 515-17, 526-27)

52. The 29886 scale of divisions promulgated in *Official-Southwestern Divisions, supra,* was prescribed for average hauls of 760 miles in Southwestern Territory, but the extreme distance for which the scale applies in Southewestern Territory is approximately 1,200 miles. (322 I.C.C. at 514) The Commission found that consistency with its action in prescribing higher intraterritorial class rates within Mountain-Pacific Territory than those in the rest of the country made it logical to prescribe a higher scale of divisional factors for service in Mountain-Pacific Territory than for service in Midwestern Territory, but that a difference of more than 10 percent would not be justified. (321 I.C.C. at 77) The prescribed scales, the Commission found, would produce moderate increases in some of the most important Midwestern divisions. (321 I.C.C. at 77; 322 I.C.C. at 514)

53. The Commission pointed out that in a number of interterritorial divisions cases it had "employed rate scales as a suitable foundation for constructing divisional scales." (322 I.C.C. at 508-9, including note 2)

(a) The Commission also made the following finding [fol. 1691] (322 I.C.C. at 509):

> " * * * it is reasonable to divide the rates to some extent in accordance with the way they are made and in this case the 10 percent higher factors for mountain-Pacific territory with other adjustments give fair recognition to the evidence as to cost of service and revenue needs."

(b) In answer to a contention of the Transcontinental lines that the scales of divisional factors prescribed for service in Western Territory were not properly constructed or justified by costs, the Commission stated (322 I.C.C. at 508):

"This contention incorrectly assumes that the construction of a divisional scale is primarily a matter of costs and mathematics. As the Commission pointed out in *Official-Southern Divisions,* 289 I.C.C. 4, 6-7, costs do not control the contours of rate scales and in a division case 'it is equally true that discretion and flexibility of judgment have attended the use of costs, particularly in determining the contours of divisional scales involving the relation of terminal and line-haul cost elements,' and 'due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula.' A similar view was recently sustained in *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675, affirmed 371 U.S. 26."

54. If the prescribed divisional scales had been structured on costs, the factors would have produced results less favorable to the Transcontinental lines than the prescribed scales. At the average hauls on either side of the border of Mountain-Pacific Territory (1,272 miles in Mountain-Pacific Territory and 988 miles in Midwestern Territory*), cost scales would give the Transcontinental lines 57 percent of the revenue on Midwestern-Transcontinental traffic for [fol. 1692] hauls in Mountain-Pacific Territory, whereas the prescribed divisional scales give the Transcontinental lines 58 percent of the revenue for such hauls.**

55. Among the findings made by the Commission in its reports with respect to the divisions of the Midwestern lines are the following:

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* Exhibit T-632, p. 15.

** Costs in cents per hundred pounds are 58.1 for 1,272 miles in Mountain-Pacific Territory and 44.7 for 978 miles in the Midwest. (MW-773 App. A, p. 7, Cols. (d) and (e)) The prescribed integers were 404 for Mountain-Pacific Territory and 294 for the Midwest. (322 I.C.C. at 525, Cols. 1, 3)

(a) After reviewing the cost evidence, the Commission found (321 I.C.C. at 50):

> "The above cost evidence shows that for the official-mountain-Pacific traffic * * * the midwestern lines received from 0.3 to 0.9 percentage points less * * * than their proportion of the cost of furnishing the service. The [Transcontinental] defendant lines received a division of revenue on the Midwest-mountain-Pacific traffic which was from 4.4 to 4.6 percentage points more than their share of the cost of furnishing the service and the midwestern lines correspondingly less."

(b) The Commission further found (321 I.C.C. at 51):

> "None of the contending groups is urging that divisions to be prescribed should rest solely on ascertained costs of service."

(c) The Commission also found (321 I.C.C. at 52):

> "It is worthy of note that the [Transcontinental] defendants' suggested divisional scales said by them to reflect actual costs without consideration of revenue needs applied in the manner which they outline would increase many of the most important present divisions. * * * Between Chicago and San Francisco via Council Bluffs the midwestern division would be increased from 16.5 to 22 percent. Between St. Louis and Spokane via [fol. 1693] Council Bluffs the midwestern division, now 12.1 percent, would become 21 percent. Between New Orleans and Los Angeles via El Paso the present midwestern division, 47.4 percent, would be increased to 50 percent. Between Memphis and Phoenix via El Paso the present midwestern division, 51 percent, would be increased to 62 percent."

(d) Concerning revenue needs, the Commission found (321 I.C.C. at 67):

"Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads."

(e) In discussing required revenue, the Commission found (321 I.C.C. at 70):

"From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the [Transcontinental] defendants to an extent not justified by ascertainable cost differences."

(f) Further in its initial report, the Commission found (321 I.C.C. at 72):

"As between the [Transcontinental] defendants and the other western railroads the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low. This is particularly true of the divisions of rates to and from Chicago, St. Louis, Memphis, and New Orleans before referred to."

(g) The ultimate findings of the Commission were that the divisions determined by the divisional scales set forth in Appendix C of the initial report and Appendix C-1 of [fol. 1694] the supplemental report would be just, reasonable, and equitable. (321 I.C.C. at 78, Finding 4; 322 I.C.C. at 520, Finding 4)

Findings re Issue No. 12

56. The data in the statement of the Commission (321 I.C.C. at 72) with respect to changes that have taken place

since 1934 in the Midwestern lines' proportion of "overhead" service appear in the record. The data for 1953 were taken from the Transcontinental lines' own traffic study. (321 I.C.C. at 72; Exhibit T-310) The data in the 1934 report were taken from that report (*Divisions of Freight Rates,* 203 I.C.C. 299, 304, 310, 320, 331), which report, by stipulation of the parties, was incorporated into the record by reference. (Transcript before I.C.C., pp. 3590-91, 3599-3600)

57. The Transcontinental lines, in a footnote on page 44 of their brief, claimed that the Commission misconceived the changes in the proportion of "overhead" traffic, and cited computations made in their petition for reconsideration before the Commission, where they argued that the data in the 1953 study were not comparable with the data in the 1934 report because the latter did not involve traffic to or from Midwest-Northwest and Midwest-Southwest Territories. By applying territorial traffic percentage relations from one of the traffic studies of the Midwestern group of lines that covered only traffic in which those Midwestern lines participated (less than 50 percent of the total traffic), and by applying those percentages to their own much broader study, the Transcontinental lines "adjusted" the 1953 study data, and reached the conclusion that the changes were different in amount from those stated by the Commission. (PR 375-76)

58. There is no indication in any of the discussion in the reports of the Commission which couples, even indirectly, the data cited by it with respect to changes in the Midwestern lines' proportion of "overhead" traffic with its determination of relative costs of service. The differences [fol. 1695] in the cost of handling originated—terminated traffic and so-called overhead traffic are reflected in the costs found by the Commission for the Midwestern lines in handling Official-Mountain-Pacific traffic and Midwestern-Transcontinental traffic.

Findings re Issue No. 13

59. There was no claim before the Commission that any of the contending groups of carriers was inefficiently operated. (321 I.C.C. at 68) The Transcontinental lines contended that the cost data of two individual carriers, the New York Central and the Chicago & North Western, overstated the true costs and real earnings of those two roads because they reflected acknowledged inefficiencies of prior managements. The omission of these two carriers from financial comparisons, the Commission found, would raise the average rate of return of the Eastern lines in 1946-1958 based on book value from 3.30 percent to 3.57 percent, and would similarly increase the rate of return for the Western lines from 3.68 percent to 3.80 percent. The importance of the criticism of past managements as proof of past inefficiency was discounted. (321 I.C.C. at 58-59) After stating that it did not regard the effect of excluding the two carriers from comparisons of rates of return "as vitally important," and that the record failed to show how cost comparisons would be affected by the exclusion of the two carriers, the Commission concluded by finding "that none of the contending groups is more or less efficiently operated than another." (321 I.C.C. at 68)

60. The claim of the Katy and Frisco in this Court that the Commission failed to make sufficient findings with respect to efficiency of operations was not presented by those carriers to the Commission in their petition for modification or reconsideration, or otherwise.

(a) In the proceedings before the Commission, the Katy and the Frisco joined with other Midwestern lines in representing to the Commission that (1) "there are no significant [fol. 1696] differences in efficiency of operations among the actively contending groups," and (2) "efficiency of operation is not a controverted issue in these proceedings," and (3) "there is no basis for any finding of significant differences in efficiency of operation among the three actively

contending groups or any of the other carriers here involved." (Brief for Midwestern Complainants dated June 13, 1960, p. 179)

(b) Before the Commission, the Katy and the Frisco also joined with other Midwestern lines in supporting the finding of the Commission "That none of the contending groups is more or less efficiently operated than another." With respect to that finding, they stated:

> "This finding is amply supported by evidence in the record (MW Brief 168-79; MW Exceptions 142); and it is not challenged by the Transcontinental Defendants. Since the cost evidence in these proceedings was presented on carrier group bases, this unchallenged finding is controlling." (Reply of Midwestern Complainants to Petitions of Other Parties for Modification or Reconsideration of Report and Order of March 21, 1963, as Amended, dated Sept. 11, 1963, p. 61)

Findings re Issue No. 14

61. The Transcontinental lines' basic contention with respect to the factor of revenue needs is that the Commission determined "the revenue needs issue with reference only to the freight portion of the transportation service of the carriers." (Transcontinental lines' Brief p. 49 and similar statements set forth in Appendix A, Item 1, pp. 127-129 to the Brief of the U.S. and I.C.C.) The facts with regard to this contention are shown in the following paragraphs:

(a) Under the heading of "Revenue Required" the Commission's conclusion with respect to the divisions as between the Eastern lines (referred to as "complainants" by the Commission) and the Western lines was that (321 I.C.C. at 71):

> "Under the requirement of the public interest that all [fol. 1697] essential parts of the transportation sys-

> tem be maintained, so far as possible, in effective working condition (*New England Divisions, supra*), we believe that there should be increases in the complainants' divisions reflecting revenue need as well as cost."

In subsequent references to the prescribed changes in divisions, the initial report states categorically that such increases were "in recognition of the evidence relating to cost and revenue need previously discussed herein," and were "based on the evidence herein relating to cost and revenue need." (321 I.C.C. at 73-74) The ultimate finding of revenue need addressed to the two contending groups within the Western District, reads (321 I.C.C. at 72):

> "As between the [Transcontinental] defendants and the other western railroads, the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low. This is particularly true of rates to and from Chicago, St. Louis, Memphis, and New Orleans."

(b) The ultimate revenue need findings above quoted were in turn based on subsidiary findings which are stated categorically to be predicated "Upon the facts relating to revenue need discussed on preceding pages" (321 I.C.C. at 65) and on "all the evidence related to revenue need." (321 I.C.C. at 67). Such facts and evidence embraced not only freight operations, revenues and net earnings, but also the total railroad operations and properties of the contending railroad groups and the earning power thereof.

(c) In its initial report, neither passenger deficits nor net earnings from freight are dealt with until well along in the Commission's consideration of revenue needs. On the first 11 pages under "Revenue Needs," the matters considered relate wholly to the following: economic development, population trends, and economic changes resulting

from shifts in population (321 I.C.C. at 53); trends by [fol. 1698] railroad groups, as well as for total United States, districts and regions, in volume of total freight transported by railroad (revenue ton miles) and in the freight revenues produced thereby, 1946-1958 vs. 1923-1930 (321 I.C.C. at 53); trends by railroad groups, districts and regions, as well as for the United States as a whole, in net railroad earnings (net railway operating income) from all services 1946-1958 vs. 1923-1930 (321 I.C.C. at 54-55); finding as to relative position of railroads in Official Territory, railroads in the Western District as a whole, and the Transcontinental lines, as carriers of freight, which finding is stated to be based on the three trends just mentioned (321 I.C.C. at 55); rates of return produced by earnings from all services on total carrier investment for years from 1946-1958 (321 I.C.C. at 55); findings that the years 1955, 1956, and 1957, were not, as contended by the Transcontinental lines, representative for comparing earnings of the Eastern and Western railroads because in those years the relation between Eastern and Western railroads in volume of freight revenues has been "contrary to the marked trend since 1951," with a passing parenthetical statement that the effect of the passenger deficits in this comparison would be pointed out later (321 I.C.C. at 56); comparison of rates of return on total investment produced by net earnings (net railway operating income) from all services for railroad groups, districts, and regions, 1946-1958 vs. 1923-1930 (321 I.C.C. at 56); comparisons for the period 1946-1954 and the period 1947-1958 of differences in annual average rates of return on total property produced by net earnings from all services dependent on whether based on book investment or on elements of value as determined by the Commission's Bureau of Valuation (321 I.C.C. at 56-57); a finding after discussion that controlling weight should be given to rates of return based on elements of value (321 I.C.C. at 58); consideration and rejection of contentions of Transcontinental lines that earnings of the New York Central and the Chicago & North Western had been under-

[fol. 1699] stated because of alleged inefficiencies of past railroad managements (321 I.C.C. at 58-59); consideration and rejection of the claim of Transcontinental lines that the amount of the acquisition adjustment of reorganized or merged railroads should be deducted from the value of their property in computing the base for determining rates of return from all services (321 I.C.C. at 59-60); and consideration and acceptance of adjustment in reported net railway operating income in order to allow for certain distortions in the incidence of the Federal income tax. (321 I.C.C. at 60)

(d) The first statement in the initial report showing the amounts of passenger deficits for railroad groups by years and by districts is not reached until page 62. (321 I.C.C. at 61) The data there shown is prefaced with the statement that passenger deficits "have an important bearing" on comparisons of net railway operating income from all services and rates of return based thereon and "should also be considered." (321 I.C.C. at 61) Data shown for "freight net railway operating income" (net earnings from all freight services) are then referred to as "complementary" to the passenger deficit comparison" and as "pertinent." (321 I.C.C. at 62) In the 1950-1958 period, the annual average net earnings from freight of the Western District railroads are shown to have exceeded those of the Eastern railroads by "a considerably greater spread" than was reflected in the corresponding net earnings from all services. (321 I.C.C. at 62)

(e) Next, the Commission considered the contention of the Transcontinental lines that their revenues from freight traffic and their rates of return had suffered more than those of other railroad groups because of the "hold-downs" imposed or allowed by the Commission on long-haul Transcontinental freight rates in connection with general rate increase cases. (321 I.C.C. at 63) To ascertain the validity of this contention relating to the effect of freight rates on overall income and rates of return it was pertinent to exam-

ine freight net railway operating income (overall net rail- [fol. 1700] way operating income less passenger deficits). The Commission found that "statistics of record fail to show the deterioration of the kind referred to * * * " (321 I.C.C. at 63) The Commission referred to its previous finding that "the financial position of the mountain-Pacific lines as freight carriers in the post-war period as a whole has been better than that of either the Eastern or the other Western lines" (321 I.C.C. at 63), and it showed that the same trends in freight net railway operating income continued in later years, thus substantiating its statement that the "statistics of record fail to show deterioration of the kind referred to by this [Transcontinental lines'] witness."

(f) The Commission then considered the contention of Transcontinental lines that their increased investment in transportation facilities in recent years has produced no return. (321 I.C.C. at 64) In evaluating this claim, the Commission took as an example the experience of the Union Pacific. In the period from 1950 to 1955 that railroad increased its net investment in transportation properties by 21 percent. In the same period, its net earnings from freight (net freight railway operating income) showed an increase by the same number of percentage points. Nevertheless, the Union Pacific experienced a reduction in its net earnings from all services by reason of the fact that the increase in its net earnings from freight had been more than offset by its increase in its deficits from passenger operations. (321 I.C.C. at 64) Next, the Commission showed that when net earnings from freight are compared, that there had been a greater upward trend for the Transcontinental lines than for the Eastern lines. (321 I.C.C. at 65)

(g) After expressing the conclusion, based on all facts set forth in its report as above described that the Eastern railroads are in a less advantageous situation as freight carriers than those in the Western District (321 I.C.C. at

65), the Commission characterized a comparison of rates of return (set forth in the table included below in subpara- [fol. 1701] graph (m) of this finding) from all services as being "the most favorable comparison from the standpoint of the Western lines." (321 I.C.C. at 65)

(h) Following that comparison, the Commission stated (321 I.C.C. at 65):

> "Of greater significance than this comparison of rates of return is the post-war trend of declining freight traffic of the Eastern railroads shown on this record. Their average annual ton-miles for the period 1947-1958, 253.4 million, were 4 percent lower than the number, 263.6 million in 1946. In only 4 of those years, 1947, 1948, 1951, and 1956, did their traffic measured by revenue ton-miles exceed that of 1946. The railroads in the Western District, on the other hand had an average of 265.3 million ton-miles per year in the same period, compared with 244.2 million in 1946, an increase of 9 percent. In only one year, 1949, did the Western District fail to show an increase over 1946. For many years prior to 1949 the Western District was below the Eastern District and Pocahontas region in respect to total revenue ton-miles, but that year marked a turning point. In the decade 1949-1958 the Western District has led the East by an overage difference of 7 percent. No developments are in sight which point to a reversal of this trend."

(i) Next, the Commission dealt with the passenger deficits and the earnings from freight service of principal Midwestern lines for the period 1950-1958. Then, upon consideration of such data, plus all other evidence pertaining to revenue needs previously discussed, (which included comparisons of net railway operating income and rate of return from all services, as set forth in subparagraph (m) of this finding), it found as follows (321 I.C.C. at 67):

"Upon all the evidence relating to revenue needs, it is our view that the midwestern lines rank below the transcontinental railroads in earning power as judged [fol. 1702] by statistics for the post-war period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads."

(j) In its supplemental report, the Commission discussed and rejected the claim of the Transcontinental lines regarding its alleged improper use of the passenger deficits data. The Commission brought forth from the record into its supplemental report a showing of passenger operating ratios over a period of recent years (322 I.C.C. at 503), but made no other additions to the facts considered. It restated some of its reasons for rejecting certain contentions of the Transcontinental lines. In the latter area, the increases shown in the passenger operating ratios of the Transcontinental lines were pointed to as responsible for what those lines had termed their "relatively static earnings" and their "revenue need problem." (322 I.C.C. at 503)

(k) The concluding two sentences of the Commission's discussion under "Revenue Needs" in its supplemental report read (322 I.C.C. at 505):

"Making allowance for such differences [unequal passenger operating ratios] in comparing net railway operating income from all services cannot be interpreted as implying a need for 'wholesale discontinuance of passenger service,' as the petitioners charge. We regard them as important in connection with the claimed revenue needs of the transcontinenfal defendants discussed in our original report. Furthermore, they refute the contention that controlling weight should be given

to comparisons of net railway operating income from all services in 1955, 1956, and 1957 when the disparity in the passenger operating ratios of the eastern and western railroad groups reached its maximum."

[fol. 1703] (l) One use made of the passenger deficits and net earnings from freight service was to aid in the evaluation of the trends of the relationships between the railroad groups reflected in rates of return from all services (321 I.C.C. at 67); the figures revealed the trends in the profit producing part (freight) of the railroads' business and in the part (passenger) that incurs losses. One use was in testing the validity of the Transcontinental lines' claim of deterioration in the freight revenues of the Transcontinental lines by reason of "hold-downs." (321 I.C.C. at 63) Another use was to evalute their claim that comparisons of financial matters should be centered on the years 1955, 1956 and 1957. (321 I.C.C. at 56; 322 I.C.C. at 505). Another use was to test their claim of lack of any return at all from increases in investment in freight facilities. (321 I.C.C. at 64; 322 I.C.C. at 503)

(m) It is thus clear from the face of the reports that the Commission did not base its findings and conclusions of relative revenue need solely on net earnings from freight services, as charged by the Transcontinental lines. Rather, the Commission expressly placed substantial reliance on many other circumstances. The factor which was set forth at greater length in the initial report than any other was the showing of rates of return on total investment in carrier properties produced by net earnings (net railway operating income) from all services. (321 I.C.C. at 55-60, 64-65) The Commission stated that the following comparisons of such rate of return was "the most favorable from the standpoint of the western lines" (321 I.C.C. at 65):

[fol. 1704] Rate of Return Produced by Net Railway Operating Income from

ALL Services—Average for 1946-58.

	Investment Basis Considered	
	Net Book	Elements of Value
Eastern lines	3.26%	3.40%
Midwestern lines	3.34%	3.49%
Transcontinental lines	3.89%	4.64%

Those rates of return are predicated on total operations and services. Those shown in the second column reflect the Commission's finding as to the property base entitled to controlling weight (321 I.C.C. at 58).

Findings re Issue No. 15

62. The Transcontinental lines' contention that the Commission based its conclusions concerning revenue need on freight earnings alone and that under this theory it was in any event obliged to consider return on freight property is answered by the Finding of Fact No. 61, *supra,* that the Commission did not, in fact, base its revenue needs conclusions on freight earnings alone.

63. The Transcontinental lines themselves presented evidence showing freight revenues and freight expenses—the difference between the two representing net earnings from freight services before taxes and operating rents—without introducing evidence regarding the value of property used in freight service. (Exhibit T-266, pp. 4, 5, 9-12, App. A, Items 2, 3; Exhibit T-272, pp. 10, 14-17, 31, 35-38; Exhibit T-263, Exhibit T-656, 657)

Findings re Issue No. 16

64. The Commission's reports show that it gave consideration to passenger deficits and freight net railway op- [fol. 1705] erating income in evaluating the Transcontinental lines' contention that consideration of rates of return from all services should be centered on data for the years 1955, 1956 and 1957 to the exclusion of other years and periods, as requested by the Transcontinental lines, and found the result would have been misleading. This was disclosed by consideration of passenger deficits and freight net railway operating income, separately, and, in relation to each other. (321 I.C.C. at 60-65; 322 I.C.C. at 505)

65. The initial report also shows that consideration was given to passenger deficits and freight net railway operating income in order to demonstrate the error of the Transcontinental lines' contention that they had suffered more severely than the Eastern and Midwestern lines from reductions in freight revenues because of competitive "hold downs" in freight rates; this contention having been found invalid by the Commission's separate analysis of net railway operating income from freight services. (321 I.C.C. at 63) Also, the Commission pointed out in its supplemental report that comparative differences and trends were "necessarily and unfairly obscured by comparing only the net railway operating income from all services in considering the respective revenue needs of the two groups." (322 I.C.C. at 504)

66. The Transcontinental lines take especial exception to the Commission's consideration of freight net railway operating income in evaluating their claim that they received no return on investment incurred for expanded operations. (TC Brief 56-59) The monies were expended in behalf of freight services, as Transcontinental lines concede. (TC Brief 54) The Commission's analysis proved that the Transcontinental lines' net railway operating in-

come from freight service had increased in approximately the same proportion as their added investment in freight service facilities, and that their net railway operating income from all services did not reflect this increase because of their increases in passenger deficits. (321 I.C.C. at 63-[fol. 1706] 65; 322 I.C.C. at 504)

Findings re Issue No. 17

67. Underlying their argument with respect to common expenses is the Transcontinental lines' assumption that the Commission decided the revenue needs issue with reference only to the freight portion of the transportation service of the carriers. This has already been found not to be true. The Transcontinental lines also contend that the Commission, in its use of passenger deficits, disregarded allocated costs which, they argue, must be borne in any event by freight operations and that this arbitrarily inflated freight earnings and that the Commission arbitrarily used, as a measure of freight earnings, figures which were strongly influenced by the amount of passenger service which is maintained. (TC Brief 66)

68. In 1957 the Commission instituted an investigation into the matter identified in its title *Separation of Operating Expenses Between Freight and Passenger Services,* 302 I.C.C. 735 (1958), for the express purpose of determining whether existing separation rules "are sound and result in useful information * * * produced valid results [and] are adequate for the purpose for which they are intended." The Commission took into consideration that both the Association of American Railroads and the General Services Administration urged "that the existing rules result in substantially accurate and useful data for the designed purpose of determining the total expenses of performing freight service and the total expense of performing passenger service, and that the rules were not intended to

determine the costs which may be avoided if passenger service were discontinued." (302 I.C.C. at 736) The Commission concluded "that the present separation rules are sound and result in useful information," and entered the ultimate finding "that the present rules governing the separation of railroad operating expenses between freight and passenger services produce valid results, are adequate [fol. 1707] for the purpose for which they are intended, and require no modification." (302 I.C.C. at 737-8)

69. Docket No. 31954, *Railroad Passenger Train Deficit*, 306 I.C.C. 417 (1959), subsequently decided, was a broader investigation into all phases of passenger deficits, including "possible ways and means of reducing and eliminating" it. In that proceeding the Commission again reviewed and affirmed the findings in Docket No. 32141 as to the existing separation rules (306 I.C.C. at 426-27); namely, that they produce valid results and are sound and adequate for the purposes for which intended. Addressing itself to the intended purposes, the first one listed by the Commission was to "provide for the ascertainment of the total expense of providing railway passenger service and the total expense of providing railway freight service by each carrier as an entity, or by groups of carriers as necessary, as a factor of consideration by the Commission in rate determination." (306 I.C.C. at 427) The use of the data to compare trends was expressly approved. (306 I.C.C. at 427).

70. The cost evidence of all parties in the instant Commission proceedings was directly based on recorded freight expenses, including the "allocated-to-freight" portion of common expenses, determined under the separation rules held valid in the cases just cited. This is also true as to the Rail Form A cost study of freight service considered by the Commission in *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), the separation between freight and passenger expenses being referred to at page 571. The order in this

case was sustained in *New York* v. *United States,* 331 U.S. 284 (1947).

71. The Transcontinental lines, themselves, introduced evidence which is of the same nature as the passenger deficits and freight operating income evidence which they now criticize. This included evidence showing freight revenues, freight expenses as determined under the Commission's rules for separating total operating expenses as between freight and passenger, and freight operating ratios. They [fol. 1708] presented the figures themselves, they showed the trends in these freight earnings over a period of years, using selected years as base periods from which to start, and they showed them both for the principal groups of lines involved in the case and for the principal railroads of the several territories. This evidence is set forth for the Southern Pacific individually in Appendix A to Exhibit T-266 of Mr. Donald J. Russell. It is set forth as to the other carriers in Exhibits T-272, 273, 656 and 657 of Witness H. J. Bearss, who testified on behalf of all Transcontinental lines. The principal exhibits of this series are T-272 and T-273. The first relates to Midwestern-Mountain Pacific lines, and the second to the Official-Mountain Pacific lines. The freight operating revenues appear on pages 10 and 31 of each of these exhibits, the freight operating expenses on pages 14 and 35, and the margin of freight operating revenues over freight operating expenses on pages 36 to 38 inclusive.

72. It is concluded in the Transcontinental lines' reply brief (p. 71, lines 13-16) that there is "no possible inconsistency in using the allocation of passenger and freight expenses in determining costs while, at the same time, insisting that passenger deficits may not rationally be eliminated in the consideration of revenue needs." In addition to the fact that the Commission did not "eliminate" passenger deficits in considering passenger needs, the Court finds that the inconsistency charged against Transcontinental lines was not that indicated in the foregoing quotation,

but the inconsistency between using expenses derived from the Commission's formula in their cost study, and, at the same time, arguing, as those lines did in their original brief (p. 71, lines 10-14) that "Because operation of passenger trains has a direct effect on the level of 'freight net railway operating income'," there is no rational basis for using the same expenses in arriving at freight net railway operating income in considering matters concerning revenue needs.

73. On page 73 of their reply brief the Transcontinental [fol. 1709] lines state that defendants assert that Transcontinental lines' argument that the Commission's use of passenger deficit statistics was arbitrary and without support in the evidence is based upon an assumption of fact which is incorrect; namely, the assumption that passenger deficits result entirely from the allocation to passenger service of expenses which are common to both freight and passenger. The Transcontinental lines state that "We did make such an assumption and, as we stated, that assumption is 'entirely consistent with everything that appears in the Commission's report or in the record'." (Reply brief 73, lines 10-12). Transcontinental lines' argument that Eastern lines then resorted to figures set forth in Commission reports in other proceedings is invalid. The basic point is that there is no evidence to support the assumption made by the Transcontinental lines. The reports in question indicate that Transcontinental lines' assumption could not safely be accepted as a substitute for evidence.

74. On page 73 of their reply brief, in lines 21-26, the Transcontinental lines state that they did not rest entirely upon the assumption in question "as we stated also that the passenger trains of the Mountain-Pacific lines produced a contribution of $26 million per year to the common costs * * **" Reference is then given to Transcontinental lines' opening brief, p. 73. This is not a correct representation of what these lines stated in their opening brief. Their

statement was that their passenger trains produce a contribution $26 million dollars per year "in excess of the expenses which the Commission considers as out-of-pocket expenses in passenger train discontinuance cases." (p. 73, lines 13-15) This is a very different thing than a contribution of $26 million dollars to the common costs.

Findings re Issue No. 18

75. The Transcontinental lines allege that the passenger deficit figures were put into the record for a different purpose than that for which the Commission used them, that nothing in the evidence "suggested any claim that the passenger deficits of the Mountain-Pacific lines should be disregarded," that nowhere in the briefs was there a "charge that the actual earnings of the Mountain-Pacific lines could or should be augmented by disregarding of passenger deficits." (TC Brief 75-76) There was no hearing, the Trancontinental lines allege, "on the claim, accepted by the Commission as decisive, that passenger deficits should be disregarded and the resulting freight earnings should be used in place of the actual earnings of the Mountain-Pacific railroads from all transportation services in determining revenue needs." (TC Brief 75)

[fol. 1710]

76. The Court has already found in substance, (Finding of Fact No. 61 (m) *supra,*) that the Commission did not, in fact, hold that "freight earnings should be used in place of the actual earnings of the Mountain-Pacific railroads from all transportation services in determining revenue needs." (TC Brief 75) That freight earnings were relevant is clear, for the Transcontinental lines themselves (and others, as well) put figures of this basic nature in evidence. The Transcontinental lines argue, however, that in their exceptions to the Examiners' recommended report they took exception to what they call the "freight carrier concept" as, *inter alia,* unsupported by the evidence and that they offered to prove facts relevant to the "charge" that their passenger deficits were excessive. They argue

also that their contention that they have been denied a hearing was disregarded in the Commission's report and that their "offer of proof" and claim of denial of a hearing were again "called to the attention of the Commission" on petition for "reconsideration." (TC Brief, pp. 77, 78)

77. The origin of the claim of denial of hearing lies in an exception taken by the Transcontinental lines to a passage in the Examiners' recommended report which those lines contended was a new charge against them by the Examiners of "excessive passenger deficits" reflecting in- [fol. 1711] efficiency in their operations "based on evidence outside the record." (TC Exceptions 20-26; PR 281-82) It was contended that this charge, if allowed to stand, would require a hearing at which they would have the opportunity to offer evidence in explanation or rebuttal. The Transcontinental lines described such evidence (*Ibid* 23 and App. II, pp. 154-167, 302-15) in such manner as to indicate a suggested full-scale investigation of passenger services and resulting deficits; but in continuation of their exception they made this concession:

> "However, it is neither necessary nor proper that the Commission undertake to resolve in this transcontinental divisions proceedings numerous and highly collateral questions as to passenger deficits. The Commission has only recently completed an extensive separate investigation, *Railroad Passenger Train Deficit*, 306 I.C.C. 417, in which it considered many of the issues underlying the Examiners' findings of 'excessive passenger deficits' here. In its report in that proceeding, the Commission squarely rejected the opinions of its Examiner, who was also the Presiding Examiner in this divisions proceeding." (TC Exceptions, p. 24; omitted from the Transcontinental lines' reprint in PR 282.)

The exception concluded with a conditional offer of proof, as follows (App. II, p. 167; PR 315):

"We offer to prove the facts set forth above in respect of the charge of 'excessive passenger deficits,' made by the Examiners on the basis of data outside the record and without any hearing if the Commission decides to pursue this charge instead of deciding this divisions case on the record made by the parties."

78. Notwithstanding this definite limitation in the so-called offer of proof, and the facts that the Commission's report did not contain any facts not of record, did not attribute any inefficiency to the Transcontinental lines (321 I.C.C. at 68), and *did not* adopt that part of the Examiners' [fol. 1712] report referred to in the Transcontinental lines' exception, they contend that their right to a fair hearing has been violated.

79. The record filed with the Court shows that the Commission's order of March 21, 1963, was served on March 28, 1963. The Transcontinental lines within 30 days thereof (the time permitted by the Commission's rules—49 CFR 1.101) filed no petition for rehearing or for further hearing. They did request an enlargement of time within which to file a petition "for reconsideration." By order of April 12, 1963 the Commission granted that request and enlarged the time to July 26, 1963. On that date the Transcontinental lines filed their petition for reconsideration. In that petition for reconsideration, the Transcontinental lines referred to this conditional offer of proof and alleged that the Commission erred "in not having accepted the offer." They further alleged, again, that the Commission had adopted "the 'freight earnings' concept of revenue needs" from the Examiners' report (TC Petition for Reconsideration 113-114; PR 372); but they petitioned only for reconsideration under Rule 1.101 (49 CFR, 1.101) and refrained from exercising their privilege to request a further hearing which is also provided for by that Rule. (TC Petition for Reconsideration, p. 1; PR 323).

Findings re Issue No. 19

80. The Transcontinental lines contend that the Commission failed to resolve what they call "the basic revenue needs issue raised in the proceeding before it," that is, the "differences in the revenue need problems of railroads serving the growing Mountain-Pacific territory as compared with the railroads serving the more stable or contracting areas of the East and Midwest." (TC Brief 79) The Commission found that (321 I.C.C. at 71):

> "We are unable to agree with the [Transcontinental] defendants and the interveners that the public interest [fol. 1713] warrants increases in the divisions of the Mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

Findings re Issue No. 20

81. In resolving the ultimate issue in these proceedings, the Commission concluded that the Transcontinental lines' divisions of Transcontinental rates are unjustifiably favorable to them (321 I.C.C. at 70); that the primary Midwestern divisions as a whole are too low (321 I.C.C. at 72); that the revenues which the Eastern and Midwestern lines derived from the present divisions are too low (322 I.C.C. at 499); that in the light of the evidence the Eastern carriers' divisions should be increased (321 I.C.C. at 74); that the divisions prescribed for the Eastern lines are not in excess of a fair and reasonable level (322 I.C.C. at 508); and that divisional factors made 10 percent higher in Mountain-Pacific than in Midwest Territory give fair recognition to the evidence (322 I.C.C. at 509). Each of those conclusions

was specifically stated by the Commission to be based, at least in part, on subsidiary findings on costs.

82. As a step in the decisional process which led it to the conclusions stated in Finding 81, *supra*, the Commission found as follows:

(a) That the Transcontinental lines' share of revenues under existing divisions of Official-Transcontinental traffic was between 4.6 and 5.8 percentage points more, the Midwestern lines' share from 0.3 to 0.9 percentage points less, and the Eastern lines' share from 4.3 to 4.9 percentage points less than their respective proportions of the cost of furnishing the service; that the Transcontinental lines' [fol. 1714] division of revenue from Midwestern-Transcontinental traffic was from 4.4 to 4.6 percentage points more and the Midwestern lines' share correspondingly less than their respective shares of the cost of furnishing the service (321 I.C.C. at 50).

(b) As an additional step in reaching the conclusions identified in Finding 81, *supra*, the Commission found with respect to settled revenues on the Official-Transcontinental traffic that the Transcontinental lines' share was 57 percent over their out-of-pocket costs, the Midwestern lines' share exceeded their out-of-pocket costs by 43 percent, and the corresponding excess of the Eastern lines was 22 percent (321 I.C.C. at 50); and also found that the present divisions give the Eastern carriers a smaller margin of revenues above out-of-pocket costs than those of the Western carriers (322 I.C.C. at 507). The finding of the Commission that the divisions prescribed for the Eastern lines are not in excess of a fair and reasonable level was directly based, insofar as costs are concerned, on a subsidiary finding that the prescribed divisions would have yielded revenues to the Eastern lines equivalent to a little more than 25.3 percent of the total revenues from the involved Official-Transcontinental traffic, and that, in comparison, the indicated costs of the Eastern lines were 26.1 percent of the

total costs. (322 I.C.C. at 508). In the case of Midwestern-Transcontinental traffic, the Commission found that the Transcontinental lines' revenue from existing divisions was 71 percent over their out-of-pocket costs while the Midwestern lines' revenue was only 39 percent over their out-of-pocket costs (321 I.C.C. at 50).

(c) The basic findings identified in Finding 81, *supra*, reflect the Commission's rejection of the Transcontinental lines' contention that their divisions should be increased by 10 percent. The Commission found with respect to Official-Transcontinental traffic that if such an increase were prescribed, the Transcontinental lines' excess of revenues over out-of-pocket costs would become 73 instead of 57 per-[fol. 1715] cent; that the excess of Midwestern lines' revenues over their out-of-pocket costs would be shrunk from 43 to 23 percent; and that of the Eastern lines from 22 to 4 percent. In the case of Midwest-Transcontinental traffic, the Commission found that under such a 10 percent increase in the divisions of the Transcontinental lines their excess of revenues over out-of-pocket costs would become 89 instead of 71 percent and the excess of the Midwestern lines would be reduced from 39 to 1 percent (321 I.C.C. at 52).

(d) The basic findings identified in Finding 81, *supra*, also reflect the Commission's rejection of a divisional plan proposed by the Midwestern lines which would have resulted in an increase in revenues of 23.62 percent for them, an increase of 4.78 percent for the Eastern lines, and a reduction of 9.19 percent for the Transcontinental lines. The Commission explained that the divisional plan of the Midwestern lines would give them a share of revenues which the Commission considered to be too large (321 I.C.C. at 67 and 73).

83. Subsidiary findings of the factors used in the comparisons among the groups on which the Commission rested its basic findings include:

(a) The Commission's findings of divisional revenues in total, and as divided among the groups, for a sample of the involved traffic selected by the Transcontinental lines (321 I.C.C. at 50).

(b) The Commission's finding of the costs in total, and as divided among the groups, which was treated by the Commission as representative of the specific costs incurred in the transportation of the traffic sample selected by the Transcontinental lines (321 I.C.C. at 50). The bases for these findings of the amounts of revenues and costs were stated as follows (321 I.C.C. at 46-47):

> "Giving effect to our criticisms of six of the [Transcontinental] defendants' departures from Rail Form A costs above stated the following table shows our restatement. Also shown are the results of defendants' cost study and Rail Form A costs; and for compara- [fol. 1716] tive purposes the revenue as settled based on defendants' study. The Rail Form A costs, (column 4) are at the out-of-pocket level for the year 1956, including a 4-percent return after Federal income taxes on elements of value and freight-train car empty-return ratios from the 7-day study. Also, they are based on the defendants' railroad groupings except that the unit costs of the so-called split roads, which operate both in mountain-Pacific and midwestern territories, were applied on a system average basis. *All costs are on the so-called revenue territory basis and the percentages reflect aggregate out-of-pocket costs in each territory.*

"Out-of-pocket costs

	Revenue as settled (1)	Defendants' cost study (2)	Restatement (3)	Rail Form A (4)
Official-mountain-Pacific traffic:				
Mountain-Pacific territory	$12,525,265	$ 8,916,391	$ 7,961,945	$ 8,052,875
Midwestern terr.	4,166,823	2,646,074	2,915,018	3,100,293
Official terr.	4,665,244	3,619,872	3,833,762	4,065,965
Total	$21,357,332	$15,182,337	$14,710,725	$15,219,133
Midwest-mountain-Pacific traffic:				
Mountain-Pacific territory	$11,633,046	$ 7,576,989	$ 6,787,337	$ 6,897,880
Midwestern terr.	4,327,628	2,929,720	3,121,143	3,208,419
Total	$15,960,674	$10,506,709	$ 9,908,480	$10,106,299
Official-mountain-Pacific traffic:				
Mountain-Pacific	58.7%	58.7%	54.1%	52.9%
Midwest	19.5	17.4	19.8	20.4
Official	21.8	23.9	26.1	26.7
Total	100.0%	100.0%	100.0%	100.0%
Midwest-mountain-Pacific traffic:				
Mountain-Pacific	72.9%	72.1%	68.5%	68.3%
Midwest	27.1	27.9	31.5	31.7
Total	100.0%	100.0%	100.0%	100.0%

"The difference between defendants' cost study (column 2) and our restatement (column 3) consists solely of the six adjustments previously discussed. All of the other refinements to and departures from Rail Form A costs, as computed by defendants, remain in our restatement." (Emphasis supplied)

84. The Transcontinental lines' evidence did not show the amount of costs, either in total or by groups, which re- [fol. 1717] sulted from their cost application to their random sample of Transcontinental traffic which moved in 1953. Rather, the amount of such costs was used only as in-put data in their computer program which produced, as a final answer, revenues when constructed on shipment-by-shipment cost proportions. (Exhibit T-632, App. C, PR 485) The Midwestern lines, by means of a computer program, unraveled the cost application of the Transcontinental lines and introduced evidence with respect to (a) the dollar amount, in total and by railroad groups, of the costs, (b) the dollar amount, in total and by railroad groups, of each individual item which was directly dependent on a particular one of the many adjustments and departures of the Transcontinental lines with respect to Rail Form A—including each of those rejected from and each of those accepted in the Commission's restatement—and (c) the dollar amount in total and by railroad groups of the Rail Form A costs for each of the individual items involved in each adjustment and departure (Exhibits MW-761, MW-768, MW-773, and MW-800).

85. In their petition for reconsideration, the Transcontinental lines directed a great many critical contentions at the Commission's findings of and use of costs in comparison with revenues as settled. They contended that in testing the lawfulness and equities of divisions, the Commission should compare revenues as settled with revenues con-

structed on shipment-by-shipment cost proportions, and not with costs as costs. In its supplemental report, the Commission continued to rely on comparisons on the bases shown in its initial report. In response to the contentions of the Transcontinental lines, the Commission amplified the statements originally made as to the basis for its restatement of the Transcontinental lines' cost study, and, in addition, stated (322 I.C.C. at 498):

> "The defendants' contentions furthermore reflect a view which differs from ours as to the weight to be accorded the cost evidence of record."

[fol. 1718] 86. For the involved railroad groups, the proportions of the costs differ as shown in the following table from the proportions of revenues constructed on shipment-by-shipment cost proportions. The proportions of constructive revenues actually submitted in evidence by the Transcontinental lines are shown below in Column (1); and proportions of the specific costs underlying those constructive revenues, without any adjustment for the restatements made by the Commission, are shown in Column (3):

Group Proportions Expressed in Percentages

	Constructive revenues as calculated in Transcontinental lines' cost study on shipment-by-shipment basis of cost proportions (1)	Range of sampling error (one standard error) shown by Transcontinental lines for figures in column 1 (2)	Costs specifically applied as costs in Transcontinental lines' cost study (3)	Column (3) percents less (—) or greater (+) than Column (1) percents (4)
Official-Mountain-Pacific traffic:				
Mountain-Pacific territory	59.1	± .5	58.7	— .4
Midwestern territory	18.1	± .6	17.4	— .7
Official territory	22.8	± .5	23.9	+ 1.1
Midwest-Mountain-Pacific traffic:				
Mountain-Pacific territory	71.8	± .5	72.1	+ .3
Midwestern territory	28.2	± .5	27.9	— .3

SOURCE OR EXPLANATION:

Col. 1: Ex. T-632, p. 21, PR-485.

Col. 2: Ex. T-632, App. C. The statistical odds are about 2:1 that the actual values are with the limits, plus or minus, of the value of one standard error.

Col. 3: Column (2) in table, 321 I.C.C. at 47.

The record does not show an application of the Commission's restatement of the Transcontinental lines' costs to individual shipments. For this reason, the record does not permit, with respect to the use of such restated costs, any measurement of the precise differences in results, dependent on the basis for the calculation of the group proportions, such as is provided with respect to the cost claimed by the Transcontinental lines by Columns (3) and (1) in the above table. It would seem reasonable to assume that such difference in connection with the Commission's restated [fol. 1719] costs would be of approximately the same magnitude as is shown in the table above in connection with the cost claimed by the Transcontinental lines.

Findings re Issue Nos. 21-23.

87. Among the cost questions which the Commission had to resolve in its evaluation of the methods followed and factors used in the measurement of costs of the involved traffic was: What empty-return ratios for each class of car (box, refrigerator, gondola, etc.) should be used in estimating the empty-car miles and the empty-gross-ton miles to be considered in calculating the gross-ton mile portion of the line-haul portion of the through costs chargeable to the loaded movements of the involved traffic? Issues Nos. 21, 22, and 23 involve attacks by the Transcontinental lines on the propriety of Commission action in dealing with the evidence of empty-return ratios. Because of the interrelation among Issues Nos. 21, 22, and 23, all facts requiring consideration in connection with these issues are arranged in the following six Findings.

88. In their initial cost studies, the Eastern and Midwestern railroads introduced evidence of empty-car ratios by classes of car (box, refrigerator, gondola, etc.). These are the studies referred to in the report as "7-day studies." The 7-day studies are periodically made by every Class I railroad under uniform instructions as to form and method prescribed by the Commission (322 I.C.C. at 494). The

Commission's Cost Section regularly processes the 7-day study data provided by the individual railroads and publishes empty-return ratios based on the data reported for each geographical operating territory (321 I.C.C. at 34). The reported data also permits determination of ratios by individual railroad and by groups of railroads, and the reported data was so used in the evidence of the Eastern and Midwestern lines.

89. In their rebuttal cost study, the Transcontinental lines introduced a special study purporting to show empty-[fol. 1720] return ratios by territories for general-purpose box cars based upon data independently selected by them as follows: (a) Mountain-Pacific Territory: a sample of loaded cars which crossed the Mountain-Pacific border in the year ending August 31, 1955 was traced as to its movement within Mountain-Pacific Territory; (b) Midwestern Territory: a sample of the cars of four railroads in the Transcontinental group whose lines extend into the Midwest (i.e., the Northern Pacific, the Great Northern, the Union Pacific, and the Santa Fe) was traced as to their empty movement in the Midwest (321 I.C.C. at 35); (c) Official Territory: no study was made and the empty-return ratio used by the Transcontinental lines in their cost study for operations in Official Territory was the same as that developed in its sample of the Midwest (321 I.C.C. at 35).

90. The Midwestern and Eastern lines introduced evidence of corrections in and restatement of the empty-return studies of the Transcontinental lines. They also introduced evidence based on studies in their respective territories, based on the cars contained in the Transcontinental lines 1953 cost sample, of the empty-return ratios limited to the tracing of empty movements of cars on those Midwestern and Eastern railroads which were complainants in I.C.C. Docket No. 31503 and Sub. No. 1 thereto. The Midwestern lines also introduced evidence showing the 7-day study empty-return ratios for all railroads operating in the Midwest and in Official Territory, which includes also those

railroads which were not complainants in I.C.C. Docket No. 31503 and Sub. No. 1.

91. The many special studies of empty-return ratios submitted in evidence varied: (a) in the periods of time in which the studies were made; (b) in the inclusion or failure to include all lines in the involved territories which handled Transcontinental traffic; (c) in the scope, form and method of the studies made; and (d) in the results produced (322 I.C.C. at 494). The 7-day studies did not show variations in these respects; rather, they followed a [fol. 1721] uniform form and method which is prescribed by Commission order; were uniform in point of time; and all Class I railroads were included. With the above evidence before it, the Commission resolved the question of which study was entitled to controlling weight in the following findings (321 I.C.C. at 37):

> "In this case where the relationship of one territory to another is of critical importance it is requisite that any special studies be made on a comparable basis in each territory."

(a) The coverage and adequacy of the special study made by the Transcontinental lines of empty-return ratios for box cars were specifically disposed of by the Commission as follows (321 I.C.C. at 37):

> "The defendants' empty-return study in the Midwest was inadequate and there was no study in the East; . . ."

(b) The Commission further referred to its reason for refusing to accord controlling weight to the empty-car ratios shown in the evidence of the Transcontinental lines in its second report as follows: (322 I.C.C. at 494)

> "The deficiencies in the defendants' studies of general-purpose boxcar empty return, as stated in our prior

report, are so serious in our opinion as to render them without value."

92. In its restatement of the Transcontinental lines' cost study, the Commission used the empty-return ratios from the 7-day study shown in the evidence of the Midwestern lines. The Commission stated its affirmative reasons for this action as follows:

(a) " . . . to obtain comparable data in each territory it is necessary to use in our restatement the empty-return ratios from our 7-day study." (321 I.C.C. at 37)

(b) "It is difficult to ascribe the empty movement of a car to a particular commodity or class of traffic because of the variety of the lading, and the fact that cars used occasionally for hauling transcontinental traffic may at other times serve widely different [fol. 1722] uses, including local movements within each territory as well as to, from, and between other territories." (322 I.C.C. at 494)

(c) "We adhere to our prior finding that the 7-day studies made under an order of the Commission and based on uniform instructions to all the railroads as to how the studies were to be made, afford a more reliable basis of comparison among territories." (322 I.C.C. at 494)

(d) "Moreover, on the basis of the evidence in this record, the 7-day studies provide appropriate comparative ratios to the traffic in issue." (322 I.C.C. at 494)

93. In their petition for reconsideration, the Transcontinental railroads contended that the Commission's restatement of six cost factors (including empty-return) was erroneous. Dealing collectively with all six, they contended that the Commission should have chosen one of the following alternatives: (1) dismissed the complaints for lack of

reliable evidence; (2) accepted the Transcontinental railroads' evidence; or (3) ordered the Eastern and Midwestern railroads to produce data in their possession (322 I.C.C. at 493). The Commission, in its supplemental report, rejected each of these contentions for reasons stated as follows:

(a) With respect to the alleged unreliability of the evidence on which the Transcontinental lines rested their alternative (1), the Commission stated (322 I.C.C. at 493):

> "Upon the facts of record as a whole we believe that the existing divisions are shown to be unjust, unreasonable, and inequitable and that justice would not be served by dismissal of the complaints."

(b) With respect to the alternative (2), the Commission considered each of the grounds of error addressed to its restatement of the Transcontinental lines' cost study and to the costs found by the Commission upon such consideration, and affirmed its prior findings with respect thereto [fol. 1723] (322 I.C.C. at 493-499).

(c) With respect to alternative (3), the Commission observed that its power to order the production of data "is not clear" (322 I.C.C. at 493). Furthermore, with respect to the alleged withholding of vital evidence, such withholding being an essential condition precedent to the order urged by the Transcontinental lines, the Commission stated (322 I.C.C. at 493):

> "... we [do not] see in the record any basis for assuming that the eastern and midwestern complainants withheld vital evidence merely because they had different conceptions of the nature and extent of facts to be developed."

94. During the pendency of the hearings the Transcontinental lines made no claim that the Eastern and Midwestern railroads were withholding data in their possession vital to the determination of empty-return ratios, nor

did they make any motion or file any petition seeking an order or subpoena of the Commission requiring the Eastern and Midwestern railroads to produce any such data.

Findings re Issue No. 24.

95. The Commission found that auto parts traffic represented about 4 percent of the total body of traffic in issue (322 I.C.C. at 494). The Transcontinental railroads assumed and used an empty-return ratio of 100 percent for auto parts box cars moving over all railroads. The Midwestern and Eastern railroads relied upon the 7-day studies, which included car-miles of all commodities moving in box cars, including auto parts traffic, to develop empty-return ratios for all the involved traffic which moved in box cars, including auto parts traffic. The 7-day study box car ratios for the railroad groups were 38 percent for the split Transcontinental railroads which operate in Mountain-Pacific and Midwestern Territories, 32 percent for railroads operating wholly in Mountain-Pacific Territory, 33 percent for railroads operating wholly in Midwestern [fol. 1724] Territory, and 39 percent for the "split" Eastern railroads operating in the "plains" area and 41 percent for the Eastern railroads operating wholly in the "plains" area. Automobile parts originate in southcentral and southeastern Michigan and move to West Coast assembly plants. Using Detroit as an origin, a loaded auto parts car would move approximately 370 miles over the Eastern lines (average Detroit to Chicago, 267 miles, and Detroit to East St. Louis, 473 miles (MW-71)), 700 miles over the Midwestern lines, and 1600 miles over the Transcontinental lines. (321 I.C.C. at 18). When such a car is assigned 7-day study ratios, the loaded and empty car miles are 518 over the Eastern lines (370 x 140 percent for loaded and empty miles (average 139 and 141 percent)), 931 miles over the Midwestern lines (700 x 133 percent), and 2160 miles over the Transcontinental lines (1600 x 135 percent (average 138 and 132 percent)). Using the 7-day study

ratios for such a car would result in assigning 59.9 percent of the total loaded and empty car miles to the Transcontinental lines ($\frac{2160}{518+913+2160}$). Using the Transcontinental lines' assumption of 100 percent empty return for the same car also would result in assigning 59.9 percent of the total loaded and empty car miles to the Transcontinental lines ($\frac{2(1600)}{2(370+700+1600)}$).

[fol. 1725] Findings re Issue No. 25.

96. Issue No. 25 involves the validity of the Commission's use of Rail Form A costs for roadway maintenance and return in its restatement of the Transcontinental lines' cost study, and the basis for that use. The background facts bearing upon this matter may be summarized as follows:

(a) Rail Form A determines the total dollars of expense and total dollars of return to be apportioned to running services and then assigns, based on studies of variability made over the years, 80 percent of the expense dollars and 50 percent of the return dollars to variable (out-of-pocket) costs. The remainder of the dollars in each category are assigned as constant costs, not varying with traffic. Rail Form A apportions to the services these out-of-pocket running costs on a gross-ton-mile basis. It apportions the constant costs to traffic on a revenue-ton and ton-mile basis. Variable plus constant costs are termed fully distributed costs. At the outset of its discussion of the cost evidence, the Commission identified Rail Form A as a widely used and acceptable means of comparing relative transportation costs, saying (321 I.C.C. at 30):

> "At that time [1920-22] and for some years later ascertainment of relative cost was difficult because sound methods of such ascertainment were lacking. Recognition of the significance of cost in prescribing comprehensive rate structures, such as those of class rates,

when comparative transportation conditions in two or more extensive territories must be considered, led to the formulation by our cost finding section of Rail Form A, which has been widely used as an acceptable means of comparing relative transportation costs."

(b) Rail Form A was the basis for the cost evidence in *Class-Rate Investigation, 1939,* 262 I.C.C. 447 (1945), in which the Commission fixed reasonable and lawfully related class rates throughout the United States east of the Rocky Mountains. The report in that case identified such studies [fol. 1726] as "Edwards' cost studies" and noted that they had been reproduced in substantial part in Senate Document 63, 78 Cong. 1st sess. (262 I.C.C. at 571; EPR, 496-501). The order of the Commission in that case was sustained in *New York* v. *United States,* 331 U.S. 284 (1947), in which the judgment of the Commission as to the costs found was accepted by the Court.

(c) In their initial cost studies, the Eastern and Midwestern railroads introduced evidence of cost of the involved traffic on the basis of Rail Form A fully distributed costs (321 I.C.C. at 50). In their rebuttal cost study the Transcontinental lines applied only out-of-pocket costs to the sample of the involved traffic which they had selected (321 I.C.C. at 50). The roadway maintenance and return costs were based directly on Rail Form A separations and apportionments insofar as the total dollars were concerned. The Transcontinental lines used variable (out-of-pocket) costs based on Rail Form A separations in their cost study as to costs in some categories, but not in the case of roadway maintenance and return. Rather as to such cost they undertook to determine variable cost by first calculating constant cost on the basis of an assumed amount per mile of track for all lines of all railroads in all parts of the country. The total constant cost for each railroad group computed on this basis was deducted from the total which Rail Form A apportions to roadway maintenance and return,

and the remainder was assigned by the Transcontinental lines to variable costs. These variable amounts were reduced to an average per gross-ton-mile for each railroad group, applied to all movements of the involved traffic, except movements in gathering study areas which the Transcontinental lines treated separately (321 I.C.C. at 37). The Midwestern lines then introduced evidence which showed the Rail Form A out-of-pocket costs per gross-ton-mile for maintenance of and return on road running facilities for each railroad group. These Rail Form A out-of-pocket units were used by the Commission in its restatement of the [Vol. 1727] Transcontinental lines' cost study (321 I.C.C. at 42).

97. The Commission's reasons for restating the costs used by the Transcontinental lines to the basis of Rail Form A variable costs may be summarized as follows:

(a) When the multiple regression formula used by the Transcontinental lines in determining the uniform constant expense per track mile for track accounts which they used in their cost study was tested by applying thereto a variance analysis, the Commission found that the following results were shown (321 I.C.C. at 39):

> "(1) When the variation explained by gross-ton-miles alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the results showed that 84.4 percent of the variation was explained by gross-ton-miles, 7.1 percent by miles of track, and 8.5 percent (standard error) was unexplained; and (2) when the variation explained by miles of track alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the result showed that 71.8 percent was explained by miles of track, 19.7 percent by gross-ton-miles, and 8.5 percent was unexplained.
>
> "These results are unsatisfactory. They are due to the fact that the influence of the two variables is not mu-

tually exclusive, and demonstrate that the multiple regression formula proves little in the absence of corroborating evidence."

(b) The Commission discussed the data offered by the Transcontinental lines to corroborate the variable maintenance of way costs claimed by them and found that one of the studies made by the Transcontinental lines, i.e., of maintenance expense shown in abandonment dockets, indicated that constant maintenance expense tends to increase with density (321 I.C.C. at 40). This is consistent with the Rail Form A basis; but not the basis used by the Transcontinental lines. With reference to another study—maintenance costs of 143 Class II railroads in the lower density [fol. 1728] group—which was shown in the evidence of the Transcontinental lines and was analyzed in the evidence of the Midwestern lines, the Commission stated (321 I.C.C. at 41-42):

"These data indicate that expense per mile increases as density increases and that the expense per mile is substantially more in the mountain-Pacific than in the other two territories. It is significant that the Midwest has at the same time both the highest density and the lowest cost per mile, and that although the 41 roads in mountain-Pacific territory are of average density their cost per mile is 48 percent greater than the roads in the Midwest."

* * * * * * *

"The use of a United States average constant expense per track mile tends to overstate the constant cost in the midwestern territory because of its lower than average density and to understate the constant cost of the other two territories because of their higher than average density."

* * * * * * *

"The United States average constant return per track mile before income taxes of $1,373 was used [by

the Transcontinental lines] in all territories. The corresponding amount by territories (computed from data of record) was $1,840 for official $1,788 for mountain-Pacific, and $1,009 for the Midwest. The use of the United States average overstates the amount of constant return in the Midwest and understates it in the other two territories."

* * * * * * *

"The use of a United States average for the constant portion of maintenance of way and structures (running) expense and return on investment has the result of ignoring or even giving a reverse effect to differences in cost among the various territories. For this reason these costs are computed by the Rail Form [fol. 1729] A method in our restatement of defendants' cost study."

98. In its supplemental report the Commission amplified its discussion of the data referred to in the foregoing statements and stated the following additional reasons for using the Rail Form A basis for variable roadway maintenance and return (322 I.C.C. at 496):

"The information available from both the abandonment dockets and the light-density class II roads shows a definite relationship between density and constant cost per mile of track, and that the constant cost per mile is different for each density group, the constant for the lower density groups being smaller than those for the higher density groups.

"The general principle is that although constant cost does not vary with individual units of output, a given actual amount (body) of constant cost is valid only at a particular level of output and for a specific size of plant facility, and that when either changes substantially the actual amount of constant will be different and the relationship between out-of-pocket and con-

stant costs should be analyzed for each level of traffic, i.e., density."

99. In considering matters raised by the Transcontinental lines in their petition for reconsideration, the Commission expressed the following views (322 I.C.C. at 495-496):

"Additionally, it should be noted that in spite of the greater cost per mile of maintaining roadway with grades, curves, and tunnels in mountains than in plains territory, the cost per thousand revenue gross ton-miles was $0.6178 in mountain-Pacific territory and $0.6893 in midwestern territory. The defendants assume, and wish us to accept as a fact, that this greater cost in the Midwest is caused by a large proportion of branch line mileage which is not used by the traffic at issue but which increases the territorial average cost.

"The following information which is based on rail- [fol. 1730] road system totals for the year 1956 should clarify this issue:

Item (1)	Source MW-743, part I sheet 4 (2)	Mountain Pacific (3)	Midwestern (4)
1. Percent that branch line mileage is of total mileage of all lines	line 1(c)	31.5 percent	31.7 percent
2. Percent that branch line traffic is of all traffic (trailing ton-miles) ..	line 5(c)	2.0 percent	3.1 percent

Item (1)	Source MW-743, part I sheet 4 (2)	Mountain Pacific (3)	Midwestern (4)
3. Main line density (freight MT-TM per mile of running track operated)	line 7(b)	8,474	4,804

"These figures show that the proportion of branch line mileage for each group is almost the same and the amount of traffic on branch lines is so small that some other factors cause the lower unit cost in mountain-Pacific territory. The principal factor is clearly the high density of traffic, 76 percent higher than the Midwest.

"Although the cost per mile may be somewhat higher in mountainous territory, this higher cost is shared by so many more tons of traffic that the cost per ton-mile is lower.

"It is the light density on the main lines in the Midwest which causes the higher costs. These lines are used by bridge traffic, and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves."

Findings re Issue No. 26.

100. The Eastern and Midwestern railroads applied Rail Form A railroad group costs per gross-ton-mile to determine locomotive costs. The Transcontinental railroads relied on a fuel consumed basis by engine districts for

locomotive costs in their first cost study (Exhibit T-314); the Midwestern railroads showed that that produced substantially the same results as the Rail Form A gross-ton-mile method (Exhibits MW-621-622 and T-676, p. 6); and the Commission found that such was the case (322 I.C.C. at 497). In their second cost study, the Transcontinental [fol. 1731] railroads computed locomotive costs on the basis of locomotive unit miles as estimated by them in the various territories. As to this underlying basis, the Commission found (321 I.C.C. at 42):

> "There is some reason to believe that the underlying number of locomotive-unit miles was not accurately assigned to the sample traffic, . . ."

To their estimated locomotive unit miles, the Transcontinental lines applied in each territory here involved the United States (excluding only the South) average costs per locomotive unit mile (Exhibit T-632).

101. The Commission found that Rail Form A gross-ton-mile locomotive costs provided the proper basis for costing the traffic. That finding was based on the following subsidiary findings (322 I.C.C. at 496-497):

> "The gross-ton-mile method is employed in applying Rail Form A, and more adequately reflects the service performed by locomotives in the respective territories which contain differing geographic operating characteristics. Apart from that fact, there was evidence here supporting its use, some of which based on fuel consumption was introduced by the defendants in an early stage of the hearings. They urged that the best method of assigning locomotive costs was on the basis of fuel consumption. The use of a fuel consumed basis produces about the same relative costs as the gross-ton-mile basis. Later the defendants switched to the diesel unit-mile basis claiming it should produce the same results as the fuel consumed basis."

(a) The Commission criticized the locomotive unit-mile basis, to which the Transcontinental railroads switched, in the following terms (322 I.C.C. at 497):

> "We consider the unit-mile basis unconvincing in the light of the evidence that the diesel unit-mile basis of computing locomotive costs has two weaknesses; first, [fol. 1732] a common unit cost was used by defendants for all three territories thereby concealing territorial differences, and second, the assignment of diesel units was on a theoretical rather than an actual basis in mountain-Pacific and official territories."

102. The Commission, in discussing the quest of the parties for a determination of territorial cost differences, reported that a witness for the Eastern complainants had offered the fact of larger engine districts in the West as having the effect of increasing the locomotive miles per day, which circumstances the witness said provided a part of the explanation why locomotive-unit mile costs are substantially higher in Eastern than in Western territory (321 I.C.C. at 42). There is a controversy as to the state of the record on how much larger engine districts are in the West than in the East.

103. In its restatement of Transcontinental lines' cost study, which restatement provided the basis for its findings of cost, the Commission made no use whatsoever of unit costs per locomotive unit mile, such costs being the subject of the testimony referred to in Finding 102, *supra*. Rather, it used unit cost per gross ton-mile for the reasons stated in Finding 101 above, and its use of such costs was in no wise dependent on the relative size of engine districts in the East and West.

104. The Eastern and Midwestern railroads applied Rail Form A railroad group costs to determine car costs. The Transcontinental railroads, on the other hand, imputed Midwestern costs to the car-miles in all territories. The

Commission found that Rail Form A car-mile costs which pertain to each railroad group, rather than the average car-mile costs for a single group (i.e., the Midwest—imputed to all groups), provided the proper basis for costing the traffic. The Commission's subsidiary findings on this point read (321 I.C.C. at 44):

> "The evidence shows that the territorial difference in car-mile costs are the result of actual operations. They [fol. 1733] are caused mainly by geographical differences and the application of the same per-diem rate to territorial groups of carriers having different degrees of car utilization and costs. These differences are related to and partially caused by the traffic at issue."

In addition, the Commission recited one of the explanations given by the Eastern lines for higher car costs in Eastern than in Western territory, i.e., a difference in average car miles per serviceable car day in the East and the West and in average miles per engine district (321 I.C.C. at 44). There is a controversy as to the state of the record with respect to the average miles per engine district. Following the recital just mentioned, the Commission enumerated a variety of differences in characteristics between the East and the West which affected car costs, naming (1) differences in the average hauls, and (2) differences in population density and congestion, which are reflected in shorter engine districts, more grade crossings, yards and metropolitan districts closer together, which make for lesser car utilization in terms of car-miles per day, and concluded (321 I.C.C. at 44):

> "This results in a higher cost per mile."

Findings re Issue No. 27

105. The Midwestern railroads applied the 7-day study empty-return ratios for refrigerator cars in their initial cost study. The Transcontinental railroads introduced evi-

dence showing the empty return by railroad groups of four ownerships of refrigerator cars—Pacific Fruit Express, Western Fruit Express, Santa Fe Refrigerator Dispatch, and Northern Pacific Railway Co. (321 I.C.C. at 36). The Eastern and Midwestern railroads criticized the Transcontinental railroads' study in several respects and continued to rely on the 7-day study showing empty return for all refrigerator cars including the cars owned by the four companies in the Transcontinental railroads' study (321 I.C.C. at 36).

[fol. 1734] 106. The Commission's findings, referred to above in connection with Issues Nos. 21 to 23, with respect to the reliability and appropriateness of the 7-day study, apply by their terms to empty-return ratios for refrigerator cars.

Findings re Issue No. 28

107. Issue No. 28 involves the basis on which the Commission determined return on property when dealing with the factor of return in its report. Return pertaining to the involved traffic was a factor in the various cost studies considered by the Commission, both those on a fully distributed basis and those on an out-of-pocket basis. (321 I.C.C. at 45; 322 I.C.C. at 498). Return pertaining to all services was a factor considered by the Commission in its evaluation of the relative revenue needs of the involved railroad groups. (321 I.C.C. at 56-60; 322 I.C.C. at 499). In any determination of return, consideration must be given to: (a) the amount of the property base; (b) the rate of return; and (c) the treatment of Federal income taxes (321 I.C.C. at 45). It was necessary for the Commission to resolve disagreements among the parties as to each of these matters. The challenge to such Commission action in this Court relates, however, only to the investment base.

108. The Eastern and Midwestern railroads presented evidence of return based on elements of value determined

by use of the Commission's valuation data. In *Fifteen Percent Case, 1937-38,* 226 I.C.C. 41, 61-64, 160-163 (1938), and *General Commodity Rate Increases, 1937,* 229 I.C.C. 435, 449, 451 (1938), the Commission, in authorizing general increases in freight rates, determined and relied on the rate-making value of railroad property by districts (Eastern, Southern, and Western) and used as the basis for that determination the valuation data which is referred to in the report in the instant case as "elements of value" (321 I.C.C. at 46). Subsequent to the reports in the general rate increase cases just mentioned, the Commission has used [fol. 1735] elements of value as a base for computing return in proceedings involving the reasonableness of particular rate structures, *New Automobiles in Interstate Commerce,* 259 I.C.C. 475, 524 (1945); in territorial class rate cases, *Class Rate Investigation, 1939,* 262 I.C.C. 447, 574 (1945), sustained in *New York* v. *United States,* 331 U.S. 284, 317 (1947), where the Supreme Court took note of elements of value as the base for computing return in the cost study relied upon by the Commission in that case; and in cases involving territorial divisions, *Southwestern-Official Divisions,* 234 I.C.C. 135, 137 (1939), and *Official-Southwestern Divisions,* 287 I.C.C. 553, 564 (1953). In their rebuttal testimony, the Transcontinental lines introduced evidence of return calculated on net book investment as a base.

109. In its restatement of the Transcontinental lines' cost study, the Commission used elements of value as the base for the return included in certain out-of-pocket cost factors applied to the Transcontinental lines' traffic sample. In explanation of this action, the Commission stated (321 I.C.C. at 58):

> "There, [in the Commission's report in *New Automobiles in Interstate Commerce,* 259 I.C.C. 475] our Section of Cost Finding used the elements of value. On page 524 of the report, it was stated that 'all rail-

roads declined to accept the rate-making values furnished by the Bureau of Valuation,' but the Commission pointed out that 'all of the elements of value which the act requires shall be considered were taken into account by the Bureau of Valuation.'

"In our judgment, controlling weight should be given the showing based on elements of value consistently with the views expressed by the Commission in other divisions cases.[7]"

"[7] *Southwestern-Official Divisions*, 234 I.C.C. 135, 147; *Official-Southwestern Divisions*, 287 I.C.C. 553, 564."

[fol. 1736] Findings re Issue No. 29

110. Issue No. 29 involves the validity of the Commission's use of Rail Form A railroad group cost factors for empty-return ratios, roadway expense and return, locomotive costs, car costs, and return on property in its restatement of the Transcontinental lines' cost study.

111. The findings in the report which support the Commission's action in using these cost factors are set forth in Findings of Fact Nos. as follows:

91, 92, 95, 106 for empty-return ratios;

97-99 for roadway expense and return;

100, 101 for locomotive costs;

104 for car costs; and

109 for the property base used in the determination of return.

112. The record before the Commission contains many thousands of pages directly pertinent to the validity of Rail Form A cost factors in the categories involved in the issue under consideration. In briefing this issue the Transcon-

tinental lines undertake no evaluation of the evidence offered by the Eastern and Midwestern lines to support the validity of the Rail Form A cost used by the Commission in its restatement. Under these circumstances it would seem unnecesary for the Court to concern itself with the evidence. Be that as it may, the following portions of the record are examples of the kind and magnitude of the evidence which supports the Commission's action in the cost factors used in its restatements:

(a) With respect to empty-return ratios, Exhibits MW-586, pp. 38-46; MW-800, pp. 1-4; T-661, p. 11, with reference to empty-return as an overhead item; T-661, p. 7, with reference to coincidences of time periods for traffic studies and empty-return studies; Transcript before I.C.C. pp. 9289-92, with respect to the lack of any basis, other than the 7-day studies, to determine empty-return ratios on intermediate lines.

[fol. 1737] (b) With respect to roadway expense and return, Exhibits MW-531 (as corrected in Transcript before I.C.C. p. 6907); MW-532; MW-743; MW-744; MW-745; MW-746; MW-747; MW-762; MW-788; MW-789; MW-790; and Transcript before I.C.C. pp. 9274, 9377, and 10442-43.

(c) With respect to locomotive costs, Exhibits T-318, pp. 21-29; T-315, pp. 18-20; T-388, pp. 10-19; T-632, App. A, p. 7; T-674, p. 27; T-676, p. 6; MW-621; MW-622; and MW-770, pp. 27-29, 46-7.

(d) With respect to car costs, Exhibits E-500, pp. 10-15; E-585, pp. 27-29; and MW-770, pp. 87-88.

(e) With respect to investment base for return, Exhibits MW-586, pp. 26-27; MW-608, pp. 30-31; MW-738, pp. 1-6; MW-771 App. J; E-400; E-401; E-411; and Transcript before I.C.C. pp. 4983-5047, 5098-5146, and 7008-7010.

CONCLUSIONS OF LAW

General Conclusions

1. This Court has jurisdiction of the parties and the subject matter of this action pursuant to 28 U.S.C.A. Sections 1336, 1398, 2284, 2321-25.

2. The responsibility of this Court is to evaluate the reports of the Commission in their entirety and determine whether the Commission has provided adequate findings and a reasonable basis for the conclusions reached. *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474 (1951); *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U.S. 541, 547-8 (1912). We review the reports of the Commission in light of its duties under Section 15(6) of the Interstate Commerce Act and the applicable law.

(a) The prescription of divisions is a legislative function delegated by Congress to the Commission to be exercised in its practical judgment and discretion after having given "due consideration" to the specified criteria listed in Section 15(6). There is no single yardstick which can be em- [fol. 1738] ployed in determining fair divisions. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 356, 359 (1936); *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675, (D. Mass. 1962), affirmed 371 U.S. 26 (1962); *Terminal R.R. Ass'n* v. *United States,* 266 U.S. 17, 30 (1924). " * * * Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U.S. 184, 197 (1923).

(b) In prescribing divisions, the Commission is authorized to give consideration to all that is relevant to the ascertainment of "fair" divisions. In such prescription, the Commission is essentially concerned with fixing fair proportions of the joint rates without regard to the amount or compensatory character of such rates. Cf. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 357 (1936). Ac-

cordingly, the evidence pertinent to the fixing of fair proportionate divisions is that of a relative or comparable character for the contending parties.

(c) In exercising its power under Section 15(6), the Commission may fix divisions as between carrier groups without contemporaneously fixing the subdivisions as among the carriers of a particular group. The converse is also true. *New England Divisions Case,* 261 U.S. 184, 201-3 (1923); *United States* v. *Abilene & Southern Ry. Co.,* 265 U.S. 274, 282-3 (1924); *Beaumont, Sour Lake & Western Ry.* v. *United States,* 282 U.S. 74, 89-90 (1930).

(d) In the exercise of its practical judgment the Commission is required by Section 8(b) of the Administrative Procedure Act to make findings on material issues of fact in order to disclose its reasons for the ultimate determination reached. The law, however, only requires the Commission to give due consideration to the criteria listed in Section 15(6) and to make such findings of fact as are necessary to settling the controversy before it. *Community & Johnson Corp.* v. *United States,* 156 F. Supp. 440, 443, [fol. 1739] (D.N.J. 1957); *Alabama G. S. R. Co.* v. *United States,* 340 U.S. 216, 227, (1951); *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173, 236 (1959).

(e) There is a clear distinction between what the Commission must hear and duly consider and what it must specifically find under the provisions of Section 15(6) of the Interstate Commerce Act and Section 8(b) of the Administrative Procedure Act. *Southern Kansas Greyhound Lines, Inc.* v. *United States,* 134 F. Supp. 502, 506-7 (D. Mo. 1955), affirmed 351 U.S. 921 (1956).

3. The Commission's narrative reports, considered as a whole, contain hundreds of subsidiary findings showing that due consideration was given to all the factors embraced in Section 15(6) of the Interstate Commerce Act. Plaintiffs and intervening plaintiffs ask this Court to look

at 29 specific areas in which they claim the Commission has erred in allegedly failing to make specific findings or in failing to give due consideration. Even though we must evaluate the Commission's reports as a whole we will look at these specific 29 areas under a microscope.

Conclusions re Issues Nos. 1-4.

4. The authority of the Commission to consider a wide variety of data in administering Section 15(6) is of broad scope. Thus, in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 358, the Supreme Court stated that the Commission is authorized "to take into account all that is relevant to the ascertainment of fair divisions." Further, at page 360, it held: "It requires no discussion to demonstrate that § 15(6) authorizes the commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also empowers the commission to take into account the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration."

[fol. 1740] 5. The Commission's narrative reports contain numerous subsidiary findings showing that due consideration was given to "all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the beneficial and alleged detrimental aspects of the prescribed divisions." (322 I.C.C. at 500)

(a) Additionally, the Commission specifically rejected plaintiffs' claim of greater costs, greater revenue needs and a greater degree of urgency to raise funds for additions, betterments and new equipment than the other groups of carriers. (321 I.C.C. 71) In view of these findings, it cannot be said that the Commission was oblivious to the possible consequences of its orders or the relation of

those consequences to the public interest, *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 532 (1946), or that there was a failure to give due consideration, in accordance with the customary and appropriate standards of revenue needs, which include such indicia as rates of return and net railway operating income, to the amounts of revenue required by the participating carrier groups to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation.

6. With respect to the financial effect upon the participating carriers of the divisions being prescribed the Commission specifically found (322 I.C.C. at 508):

> "We find that the divisions prescribed are necessary, in the public interest, to maintain *all essential parts of the transportation system* in effective working condition." (Emphasis supplied.) (See also 321 I.C.C. at 71.)

(a) The Commission's findings that the prescribed divisions would give the Eastern lines a smaller proportion of revenues than their cost proportions and that the increases to the Midwestern lines were "moderate" provide a quantitative measurement of the effect of the prescribed divisions [fol. 1741] on the Eastern, Midwestern and Transcontinental lines. In the light of these findings, the Transcontinental lines' contention that the Commission has failed to measure the financial effect of the prescribed divisions and the extent which the prescribed divisions meet the needs of the carriers must mean that the Transcontinental lines believe that Section 15(6) of the Interstate Commerce Act requires the Commission to reduce its measurement to dollars and cents. There is no such requirement in Section 15(6), either express or implied. It is enough that the Commission consider and find the relative needs of the contending carrier groups and consider and find whether

the prescribed divisions are consistent with those needs. That is what the Commission did here.

7. With respect to revenue needs the Commission specifically found:

> "The most favorable comparison from the standpoint of the western lines, we believe, is the showing that the average return of the eastern district and Pocahontas region in 1946-58, based on net railway operating income from all services adjusted for income tax differences as before explained, related to book investment, was 3.26 percent, compared with 3.34 percent for the midwestern group and 3.89 percent for the transcontinental defendants. If the elements of value are used as the investment base, the percentages become 3.40 for the eastern lines, 3.49 for the midwestern group, and 4.64 for the defendants." (321 I.C.C. at 65)

> "Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable con- [fol. 1742] dition than the eastern railroads." (321 I.C.C. at 67)

> "We are therefore of the view that from the standpoint of both cost and revenue needs the prescribed divisions are not in excess of a fair and reasonable level." (322 I.C.C. at 508).

(a) The Commission's findings, particularly those relating railroad earnings from all services of the three contending groups to their investment in properties, provide a quantitative measurement of the revenue needs of the

contending carriers. In the light of these findings, the Transcontinental lines' contention that the Commission has failed to measure, or even consider, the needs of the contending carriers must mean that the Transcontinental lines believe that Section 15(6) requires the Commission to reduce its measurement to dollars and cents. There is no such requirement in Section 15(6), either express or implied. It is enough that the Commission consider and find the relative needs of the contending carrier groups in meaningful terms. That is what the Commission did here.

8. The Commission was not required by Section 8(b) of the Administrative Procedure Act to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to (a) the amounts of revenue required by the participating carrier groups to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, or (b) the financial effect of the divisions being prescribed upon the participating carrier groups. There is no omission in the reports of the Commission of any findings of fact necessary to support the orders of the Commission here under attack, with respect to (a) the amounts of revenue required by the participating carriers or carrier groups to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, or (b) the financial effect of the divisions being prescribed upon the participating carriers or carrier groups. To the con- [fol. 1743] trary, there is substantial evidence in the record to support the findings of the Commission, and the findings that were made adequately disclose that it has had regard for, and has given due consideration to, all factors which attend the proper discharge of its function under the provisions of Section 15(6) of the Interstate Commerce Act.

Conclusions re Issue No. 5

9. The Commission was not required by Section 8(b) of the Administrative Procedure Act to find and state in its reports the financial effect upon the individual carriers before it of the divisions being prescribed.

10. The "due consideration" which the Commission is required by Section 15(6) of the Interstate Commerce Act to give to the revenue needs of the carriers concerned in a divisions proceeding did not require the Commission to give consideration to the individual financial requirements of the individual carriers before it, in view of the circumstances and of the facts (a) that the proceedings before the Commission were tried, submitted, heard and decided primarily upon a carrier group basis, (b) that no individual carrier asked for special treatment on account of financial weakness, and (c) that the evidence as presented by the parties would not permit such consideration. *New England Divisions Case,* 261 U.S. 184, 197-99 (1923).

11. The Commission could properly consider and determine the issues before it primarily upon the carrier group basis upon which they were tried and submitted. *New England Divisions Case,* 261 U.S. 184, 197-99 (1923); *Beaumont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U.S. 74, 82-83 (1930).

12. The Commission could properly prescribe territorial group bases of divisions without prescribing subdivisions for all of the individual carriers. *New England Divisions Case,* 261 U.S. 184, 201-3 (1923); *United States* v. *Abilene & Southern Ry. Co.,* 265 U.S. 274, 282-83 (1924); *Beau-*
[fol. 1744] *mont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U.S. 74, 89-90 (1930).

13. Even if the Commission were required to give consideration to the amounts of revenue required by the Denver & Rio Grande Western Railroad and to the financial effect of the divisions being prescribed upon that carrier,

and to find and state such financial effect in its reports, the claim of the Denver & Rio Grande Western in that regard cannot be raised in this Court in view of the fact that it joined with other Transcontinental lines before the Commission (a) in stating that the pleadings did not bring into issue the lawfulness of divisions over the Utah gateways or of subdivisions within Mountain-Pacific Territory, and (b) in opposing the prescription of subdivisions for carriers in Mountain-Pacific Territory.

Conclusions re Issue No. 6

14. By enacting Section 15(6), Congress intended that a method be employed by which the Commission's task of prescribing just, reasonable, and equitable divisions could be performed. *New England Divisions Case,* 261 U.S. 184, 197 (1923). There is no single test by which just divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what divisions will conform to the standards of Section 15(6). *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359 (1936). The question of what constitutes just and fair divisions involves the making of practical judgments, and cannot be solved as though it were a mathematical problem to which there can be only one correct answer. *Boston & Maine R. Co.* v. *United States,* 208 F. Supp. 661, 675 (1962), affirmed 371 U.S. 26 (1962). A just and fair division is the amount properly apportioned out of a joint rate, and that amount is to be fixed at what the Commission finds to be just, reasonable and equitable without regard to agreement of the parties, mileage, or costs. *New England Divisions Case,* 261 U.S. 184, 195 (1923); *Interstate Commerce* [fol. 1745] *Commission* v. *Hoboken R. Co.,* 320 U.S. 368, 381 (1943).

15. So long as the Commission has given due consideration to the criteria in Section 15(6) and the evidence bearing on the problem before it, there is no necessity that

it make specific findings disclosing its mental processes as to why it prescribed each and every particular division. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359 (1936). Section 8(b) of the Administrative Procedure Act must be considered in relation to the statutory requirements of Section 15(6) of the Interstate Commerce Act. Section 15(6) cannot be read as establishing the principle that, in the exercise of its practical judgment, the Commission must, by equation or otherwise, set forth the particular weight given to any evidence or relate any division prescribed to the standards specified in Section 15(6) of the Interstate Commerce Act.

16. The Commission was not required by Section 8(b) of the Administrative Procedure Act to find and state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to the percentage divisions which it prescribed for application on Official Transcontinental traffic. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173, 236 (1959); *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 670-71 (1962), affirmed 371 U.S. 26 (1962).

Conclusion re Issue No. 7

17. The findings of the Commission with respect to a minimum division of 15 percent, and its prescription of such minimum division are supported by substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act.

Conclusions re Issue No. 8

18. Where, as here in the case of Montana-Official divisions, the general basis, as distinguished from divisions [fol. 1746] of commodity rates, was in dispute, the Commission on the record before it properly prescribed new divisions consistently related to the other group percentages determined by it to be proper. Section 15(6) of

the Interstate Commerce Act specifically authorizes the prescription of divisions where such divisions as may obtain were agreed upon by the carriers or otherwise established. The record before the Commission contained evidence which was typical in character and ample in quantity to support its prescription of divisions of Transcontinental rates (a) between points in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Peoria and St. Louis, and (b) between points in Group E-5 (Southeastern Illinois) in Official Territory and points in Montana (Groups W-4 and W-5) over routes via Chicago.

19. The claim of the Katy and the Frisco that the record did not contain evidence typical in character and ample in quantity to support the Commission's prescription of divisions over routes embracing their respective lines cannot be raised in this Court in view (a) of the fact that said carriers did not present such claim to the Commission by petition for reconsideration or otherwise, and (b) of their representations to the contrary before the Commission. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36-37 (1952).

20. If the foregoing claim of the Katy and the Frisco can be raised in this Court, the record before the Commission contained evidence which was typical in character and ample in quantity to support the action of the Commission in prescribing divisions over routes embracing the lines of the Katy and Frisco.

Conclusions re Issues Nos. 9-11

21. Conclusions of Law Nos. 14 and 15 relating to Issue No. 6 are restated here.

22. The Transcontinental lines contend in essence that the Commission must make findings relating each and every [fol. 1747] factor entering into the construction of the prescribed divisional scales to a specific standard of Sec-

tion 15(6) of the Interstate Commerce Act; that the only available standard in the evidence is the cost standard; and that there are no rational findings to support the contour of the prescribed scales. These contentions assume that a divisional scale must be structured on costs; that the Commission must make a finding with respect to terminal costs and then a finding relating the starting point of the scale thereto; and that the amount of the spread between the starting integer and successive integers in the scale must also be related to costs and must be shown to have a cost relationship to the starting point of the scale. There is no requirement in Section 15(6) that a divisional scale, or any factor therein, bear a specified relationship to costs. Nor is there any requirement that each and every factor entering into the construction of a prescribed divisional scale be expressly related to each standard of Section 15(6). It is sufficient that the Commission settled upon scales and scale factors which it held "give fair recognition to the evidence as to cost of service and revenue needs." (322 I.C.C. at 509) There is no claim under the issues that that finding is without the support of substantial evidence. The construction of the prescribed divisional scales was based on practical judgment and not on a mathematical formula, and there is nothing in the record or the reports which could cause the Court to say that action so based is irrational.

23. The Commission was not required by Section 8(b) of the Administrative Procedure Act to find and state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to the divisional scales which it prescribed for application in Midwestern and Mountain-Pacific Territories. *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 236 (1959); *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661, 670-71 (1962), affirmed 371 U.S. 26 (1962).

Conclusion re Issue No. 12

[fol. 1748] 24. The Commission's statement with respect to changes that have taken place since 1934 in the Midwestern lines' proportion of "overhead" service is supported by substantial evidence. The Commission presumably was aware that the data in the 1953 study might not be fully comparable with the data in the 1934 report. The weight and the significance of this evidence were administrative questions for the Commission. *New England Divisions Case,* 261 U.S. 184, 204 (1923); *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359, 362 (1936). The statement with respect to changes in the Midwestern lines' proportion of "overhead" traffic did not enter into or form the basis of any of the Commission's findings or conclusions with respect to relative cost of service; and any error which possibly may inhere in said statement is immaterial and in no way prejudicial to plaintiffs or intervening plaintiffs. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173, 193-94 (1959); *William M. Feinstein* v. *United States,* 209 F. Supp. 613, 623 (S.D.N.Y. 1962), 317 F. 2d 509, 512-13 (C.A. 2, 1963); *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 691 (C.A. 9, 1949), certiorari denied 338 U.S. 860, rehearing denied 339 U.S. 945 (1950).

Conclusions re Issue No. 13

25. The claim of the Katy and the Frisco that the Commission failed to make sufficient findings with respect to efficiency of operations cannot be raised in this Court in view (a) of the fact that said carriers did not present such claim to the Commission by petition for reconsideration or otherwise, and (b) of their representations to the contrary before the Commission. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36-37 (1952).

26. If the foregoing claim of the Katy and the Frisco can be raised in this Court, the Commission was not required by Section 8(b) to state in its reports any findings, [fol. 1749] conclusions, bases or reasons, beyond those stated therein, with respect to efficiency of operations.

Conclusions re Issue No. 14

27. Contrary to the fundamental basis upon which plaintiffs' contentions rest with respect to this issue, the Commission did not, in fact, reach its conclusions on revenue needs solely on the basis of facts which eliminated passenger deficits or, stated differently, with reference only to the freight portion of the transportation service of the carriers.

28. The Commission's reports show that it gave due consideration to facts other than those which eliminate passenger deficits, including, *inter alia,* net railway operating income from all services and rate of return from all services.

29. The Commission was not prohibited by law from considering facts relating to passenger deficits and freight net railway operating income, along with other facts, including net railway operating income and rates of return from all services, in determining relative revenue needs. By Section 15(6) of the Interstate Commerce Act "Congress * * * authorizes the Commission to take into account all that is relevant to the ascertainment of fair divisions. * * * The Commission alone is authorized to decide upon weight of evidence or significance of facts." *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 358-359 (1936); *Boston and Maine Railroad* v. *United States,* 208 F. Supp. 661, 675 (1962); affirmed, 371 U.S. 26 (1962). The Commission's decision that these facts were relevant was well within its discretion and the Court may not substitute its judgment for that of the Commission with reference thereto.

30. The inference in the Transcontinental lines' statement of issues that the Commission simply "recited" the evidentiary facts other than those which eliminate passenger deficits and did not give them "due consideration" is not justified. It is against the express words of the [fol. 1750] Commission's reports stating that the issue was

determined on the basis of all of the evidence, and the reports show that careful and detailed consideration was given, *inter alia,* to net railway operating income and rate of return from all services and to basic economic trends in the several areas involved.

31. On page 58 of their reply brief, the Transcontinental lines refer to two sentences from the supplemental report in which, they say, the Commission "summarized the revenue needs considerations which led it to conclude that the Eastern lines divisions should be increased * * *", which sentences the Transcontinental lines read as stating that "1) the Commission's determination was based upon 'earning power * * * as freight carriers'; and, 2) that the Commission did not base its conclusions on 'income from all services' because of the passenger deficits."

(a) The Transcontinental lines misread the two sentences quoted from the Commission's report. The Commission said therein only that certain evidence "also disclosed that the trend in the earning power of the Eastern roads as freight carriers * * * has been much less favorable than that of the Western roads," and that "Comparison of net railway operating income from all services however, does not fully show that trend" because of the difference in passenger operation ratios. This is very different from the conclusions which the Transcontinental lines say the Commission stated in these two sentences. (322 I.C.C. at 507)

32. From the above argument the Transcontinental lines urge the conclusion that "it is thus apparent from a reading of the Commission's reports that the Commission reached such conclusions as it did reach on the general relativity of revenue needs by eliminating the portions of such needs represented by passenger deficits without considering the actual revenue needs of the carriers from all transportation services." Such a conclusion is primarily shown to be incorrect by the Findings of Fact relating to Issue No. 14.

[fol. 1751] 33. With respect to the Commission's using words such as "earning power as freight carriers," it is plain that it is in the freight service that the potential for earnings lies, since passenger service is operated at a loss by all of the carrier groups involved; and the Court observes also, as shown in the findings made above on this issue, that the Commission also stated conclusions and comparisons as between the groups of lines on the subject of revenue need without using the words "as freight carriers."

34. Likewise incorrect is the statement in the Transcontinental lines' reply brief (p. 57, lines 11-16) that while the original report contained a "preliminary discussion of evidence which relates to all transportation services," when the Commission "reached such conclusions as it did reach on the general relativity on revenue needs, they were based upon the relativity of such needs 'as freight carriers' ". The Commission several times stated that in reaching its conclusions concerning revenue needs it did so on the basis of all of the evidence, thus including that embraced within what the Transcontinental lines now choose to characterize as "preliminary discussion".

35. In stating (TC Reply Br. p. 57, lines 18-19) that in its supplemental report the Commission "declared that the elimination of passenger deficits was 'important' to its decision," the Transcontinental lines incorrectly quote said report. The Commission's statement was: "We regard them as important in connection with the claimed revenue needs of the Transcontinental defendants discussed in our original report." (321 I.C.C. at 505)

(a) An example of the "claimed revenue needs of the Transcontinental defendants discussed in [the] original report" was the claim that the Transcontinental lines have a large amount of traffic that was subject to hold downs under the general freight rate increase authorizations and that this was responsible for the persistent decline in their

rate of return, the Commission pointing out that this was [fol. 1752] not true, as shown by the trend of the Transcontinental lines' freight earnings. (321 I.C.C. at 63) To say that the passenger deficit figures were important in analyzing such a contention, and other contentions of the Transcontinental lines, is not to make the statement attributed to the Commission in the reply brief of those lines, namely, that the Commission "declared that the elimination of passenger deficits was 'important' to its decision".

36. On page 60 (line 11 seq.) of their reply brief, the Transcontinental lines conclude that:

> "Defendants also rely upon differences of one percentage point or less in the rates of return on all transportation property as providing a basis for a conclusion by the Commission that the revenue needs of the Mountain-Pacific roads are less than those of the other railroads (ICC Brf. pp. 75-77; MW Brf. pp. 69-71). But rates of return do not measure the actual revenue needs of the carriers because they do not reflect the additional investments in cars, track and other facilities needed to serve the public. The funds expended for additions to railroad plant constitute real expenses of serving Mountain-Pacific territory because the railroads serving that territory do not receive any additional earnings to support the additional investments."

The Court finds that whether rates of return are a proper measure of revenue needs is an administrative matter for the Commission and that it is not for the court to decide that the Commission should have cast aside the evidence concerning the rates of return in favor of the argument advanced by the Transcontinental lines.

37. Transcontinental lines' attempt to rebut the Eastern lines' showing that they too have received no additional earnings on their additional investment is not sustained.

In their calculation (Reply Br. 60-61), the Transcontinental lines use the increase in net investment and in net operating income, comparing 1957 with 1947. Their result is dependent upon the selection of the years involved. [fol. 1753] Thus, using the year 1958 instead of 1957, the following would be the result:

	Increase in Net Investment 1947 versus 1958		Increase in Net Railway Operation Income 1947 versus 1958	
	Eastern Lines	M-P Lines	Eastern Lines	M-P Lines
Amount	$1,616,137,859	$1,559,740,588	(d) $69,682,836	$38,631,020
% Increase	15.9%	29.9%	(d) 22.9%	20.0%

(d)—Decrease

These calculations are made from Exhibits E-36, pages 3 and 6, and Exhibit E-701, page 1.

Conclusions re Issue No. 15

38. In considering revenue needs, the Commission was not prohibited by law from considering the evidence relating to freight net railway operating income and passenger deficits, along with other pertinent facts, including net railway operating income and rate of return from overall railway operations, without considering, also, the value of railway property held for and used in freight transportation service.

39. It was within the discretion of the Commission to consider evidence relating to passenger deficits and net railway operating income from freight service and trends therein from the standpoint of absolute dollars and without relating such net railway operating income to the value of railway property held for and used in freight transportation service; and there was nothing arbitrary in the Commission's having done so. By Section 15(6) of the Interstate Commerce Act, the Commission is authorized "to take into account all that is relevant to the ascertainment of fair divisions." *Baltimore & Ohio R.*

Co. v. *U.S.*, 298 U.S. 349, 358 (1936). Questions of relevance, weight to be given evidence, and the significance of facts are for the Commission alone to decide. *Baltimore & Ohio R. Co.* v. *United States, supra,* at pages 358-359; *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675 (D. Mass. 1962), affirmed 371 U.S. 26 (1962).

[fol. 1754]

Conclusions re Issue No. 16

40. The Transcontinental lines' contention that the reports disclose an "absence of reasoned findings supporting reliance upon earnings for freight services only" (TC Brief 55) is shown to be factually without substance, and it is disallowed by the Court.

41. In their effort to impute error into the consideration which the Commission gave to the comparative trends in passenger deficits and in volume and earnings of freight operations (321 I.C.C. at 60-65; 322 I.C.C. at 501-5), and in endeavoring to avoid recognition of the basic reasonableness and logic supporting the consideration actually given to passenger deficits and their counterpart net railway operating income from freight service, the Transcontinental lines and the intervening plaintiffs ignore the basic facts (a) that the Transcontinental lines' evidence and contentions advanced throughout the proceeding made it essential for the Commission to consider net railway operating income and passenger deficits separately as well as in combination; and (b) that in addition to proof of the Transcontinental lines' remarkably higher standing as freight carriers, the facts of record show no less markedly and conclusively their outstandingly high position in relation to their opponents when the evidence reflecting results from all services is alone considered. As previously shown, the Commission found comparative rates of return based on elements of value for the years 1946-1958

as 3.40 percent for the Eastern lines, 3.49 percent for the Midwestern lines, and 4.64 percent for the Transcontinental lines. This comparison is a significant indicator of revenue needs, and shows that in net earnings from all railroad services the Transcontinental lines have a superiority of 36 percent over the Eastern lines and 33 percent over the Midwestern lines. Revenue needs, the Supreme Court said, "reflect the totality of conditions under which the carriers in the respective territories operate." *New York* v. *United States,* 331 U.S. 284, 348 (1947).

42. As shown by its findings, the Commission took [fol. 1755] those facts into consideration, along with freight net railway operating income, passenger deficits and all of the other matters bearing on revenue needs previously discussed (321 I.C.C. at 53-65), including a declining post-war trend in total freight traffic of Eastern lines with no visible prospect of reversal in comparison with a slight increase for the Midwestern lines and a 13 percent increase for the Transcontinental lines. (321 I.C.C. at 65, 67)

43. Transcontinental lines' contention under this issue, in its essential basis, is also contrary to the Supreme Court's decision in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359 (1936), wherein the Court held that "There is no single test" and "no fact or group of facts may be used generally as a measure by which to determine what division will conform" to the standards of Section 15(6) of the Interstate Commerce Act; that "The Commission alone is authorized to decide upon weight of evidence or significance of facts"; that "Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases"; and that error as to the weight accorded evidence "is not a misconstruction of the Act."

(a) This interpretation of the Congressional intent embodied in Section 15(6) has been confirmed by later

decisions in reviewing Commission orders involving divisions. *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U.S. 368, 381 (1943); *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661, 665 (D. Mass. 1962), affirmed 371 U.S. 26 (1962).

(b) Section 15(6), as thus authoritatively construed, made it the function of the Commission to consider and weigh, as it did, the passenger deficit evidence for its bearing on the other revenue need evidence showing the relative situations of the railroads here involved. The reports of the Commission show that the Commission, in performing its discretionary function, made appropriate findings.

44. The Transcontinental lines' further contention that [fol. 1756] "the Commission failed to make findings reconciling its treatment of passenger deficits in this divisions case with its treatment of carrier revenue needs under other sections of the Interstate Commerce Act" is invalid. An alleged inconsistency of a report under review with Commission reports in other proceedings is not a ground for setting a Commission order aside. *Virginia Ry. Co.* v. *United States*, 272 U.S. 658, 665-66 (1926); *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482 (1918); *Georgia Public Service Com.* v. *United States*, 283 U.S. 765, 775 (1931); *Feinstein* v. *United States*, 209 F. Supp. 613 (S.D. N.Y. 1962); *Feinstein* v. *United States*, 317 F. 2d 509 (2d Cir. 1963).

(a) In deciding each case, the Commission must determine what facts are entitled to weight and the weight to be given. That the Commission, in a general freight rate increase under Section 15a may give weight to passenger deficits in authorizing increases in freight rates sufficient to produce adequate net earnings from total operations, a power recognized by the Supreme Court in *King* v. *United States*, 344 U.S. 254, 263-4 (1952), does not mean that the Commission must treat passenger deficits in a fixed manner

in that type of case or in a case arising under Section 15(6) and certainly does not mean that the Commission may not regard figures showing passenger deficits and freight income as relevant to issues that arise in a case such as that here under review.

45. Section 8(b) of the Administrative Procedure Act did not require the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to its consideration of the evidence relating to freight net railway operating income and passenger deficits, along with other pertinent facts.

Conclusions re Issue No. 17

46. Figures relating to passenger deficits cannot be said, as a matter of law, to be entitled to no consideration in the [fol. 1757] absence of a separation of passenger expenses between those solely related to passenger service and the common expenses which are apportioned as between passenger and freight services. This is a matter for the Commission's sole determination. There was nothing arbitrary in its use of passenger deficits or net railway operating income from freight services.

47. The Commission was not circumscribed in its use of evidence relating to passenger deficits, freight net railway operating income, or freight revenues and expenses. The significance of such evidence was a matter which the Commission alone was authorized to decide. *Baltimore & Ohio* v. *U. S., supra,* at pages 358-9. It is not for the Court to say that such evidence could have significance and could be considered by the Commission, along with all other evidence, only if further facts were developed and put in evidence.

48. Decisions in train discontinuance cases, such as discussed on pages 62 through 74 of the Transcontinental lines' brief (which cases involve statutory standards quite different from those in Section 15(6)) are devoid of signifi-

cant relationship to what the Commission here considered and concluded. The appraisal of these complicated problems of transportation economics and cost accounting was for the Commission and should not be disturbed on judicial review. *New York* v. *United States*, 331 U.S. 284, 335, 348-349 (1947).

49. It is not for a reviewing court to say, as Transcontinental lines would have us say, that the separation rules prescribed by the Commission for use in ascertaining freight and passenger expenses do not "produce reliable or even meaningful data for use in measuring relative revenue needs." (TC Brief 7)

Conclusions re Issue No. 18

50. The claim of denial of a full and fair hearing may not be litigated in this Court because the Transcontinental lines made no unconditional request (or request subject to [fol. 1758] a condition which happened) for a hearing with respect to the matter of passenger deficits and freight earnings, either by the filing of a petition for further hearing or otherwise. The principle here applied was invoked in *Beaumont, Sour Lake & Western Ry Co.* v. *United States*, 36 F.2d 789 (W.D.Mo. 1929), affirmed 282 U.S. 74 (1930), where a three-judge District Court refused to consider an objection to an order of the Interstate Commerce Commission prescribing divisions which had not been presented in the petition for rehearing filed by the plaintiffs with the Commission. At page 800, the District Court said that "in the petition for rehearing this point was not urged, and it cannot now be fairly considered as a ground for vacating the order." The ruling of the District Court in the *Beaumont* case is now well established law. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501 (1955); *Gateway Transportation Co.* v. *United States*, 173 F. Supp. 822, 828 (W.D. Wis. 1959);

J. H. Nowinsky Trucking Co. v. *United States,* 195 F. Supp. 748, 751 (W.D. Wis. 1961). The reasons for the rule are well stated in *United States* v. *Tucker Truck Lines, supra*:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objection to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (344 U.S. at 36-37)

51. In addition, however, on Transcontinental lines' contention that they were denied a full and fair hearing "be- [fol. 1759] cause there was no hearing on the claim, accepted by the Commission as decisive, that passenger deficits should be disregarded and the resulting freight earnings should be used in place of the actual earnings of the Mountain-Pacific railroads from all transportation services in determining the revenue needs" (TC Brief 75), the Court concludes against the plaintiffs and the intervening State Commissions, because:

(a) The Commission did not, in fact, accept, as decisive, any claim that passenger deficits should be disregarded and resulting freight earnings be used in place of actual earnings of the Mountain-Pacific railroads from all transportation services in determining revenue needs, and, severally;

(b) The Transcontinental lines' alleged offer of proof in their exceptions was conditioned upon the Commission's

adopting a charge, attributed to the Examiners, that the Transcontinental lines had excessive passenger deficits and that they resulted from inefficiency, which charge the Transcontinental lines excepted to and the Commission did not adopt; and

(c) Unlike the recommended report, to which exception was taken on this point by Transcontinental lines on the ground, in part, that it was based upon facts not of record, the Commission's report was based only on evidence of record.

52. Contrary to Transcontinental lines' contention (their brief, p. 77) there are no "factual issues raised by defendants themselves in their effort to answer [Transcontinental lines'] claim that the Commission's action with respect to passenger deficits was arbitrary."

Conclusions re Issue No. 19

53. Section 8(b) of the Administrative Procedure Act did not require the Commission to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, in disposing of the Transcontinental lines' contention that they had greater revenue needs because of dif- [fol. 1760] ferences in the revenue need problems of railroads serving the growing Mountain-Pacific Territory as compared with the railroads serving what Transcontinental lines call the "more stable or contracting areas of the East and Midwest." (TC Brief 76)

54. The revenue need issue as stated by the Transcontinental lines, was not "the basic revenue needs issue before the Commission." In its consideration of revenue needs, the Commission was not confined to what the Transcontinental lines elected to emphasize and to call the "basic revenue needs issue." It was obliged to consider all of the evidence of all of the parties with respect to revenue needs, and it did so.

Conclusions re Issue No. 20

55. The contention of the Transcontinental lines that the Commission's order is invalid by reason of an alleged failure to give the reasons or basis for certain subsidiary findings on which the Commission based its findings with respect to cost of service cannot be sustained. The subsidiary findings in question fall into four categories: (1) those in which the Commission found for the involved railroad groups the extent to which their respective shares of revenues under existing divisions were greater or less than their respective proportions of the cost incurred in furnishing the through services; (2) those in which the Commission found what would be the relationship of the group revenues produced by prescribed divisions to the group costs incurred in furnishing the involved through services; (3) those in which the Commission found for the involved railroad groups the relation of revenues received under existing divisions to the out-of-pocket portion of their respective operating expenses, taxes and return on the railway property devoted to the involved through services; and (4) those in which the Commission found what would be the effect on the relationship of group revenues to group out-
[fol. 1761] of-pocket costs if changes in divisions proposed by certain parties in existing divisions were prescribed.

56. There is no basis, other than the basis of cost used by the Commission, on which to make the relevant comparisons in categories 3 and 4. The fact of such relevancy to specific standards in Section 15(6) is obviously sufficient to satisfy any requirement with respect to a rational reason.

(a) In the case of the comparisons in categories 1 and 2, it is possible to determine for railroad groups the extent to which their respective shares of divisional revenues are greater or less than their respective proportions of constructive revenues when calculated on the basis of shipment-by-shipment cost proportions. The Transcontinental lines used that method in the computer program by which they

obtained the final answers produced by their own cost study. The Commission elected not to use that method. Instead, in its comparisons in categories 1 and 2 it used the same aggregate costs it used in testing the lawfulness of the involved divisions by comparisons in categories 3 and 4.

(b). The Commission's identification of aggregate costs as the basis in its various comparisons evidences the Commission's decision to give weight thereto. The law does not require the Commission to state reasons for according weight to each different piece of evidence on which it bases findings. *Stott* v. *United States,* 166 F.Supp. 851, 862 (S.D. N.Y., 1958), and *Columbia Transportation Company* v. *United States,* 167 F.Supp. 5, 15, (E.D. Mich., S.D., 1958). Furthermore, Section 8(b) does not require an administrative body to state a basis for a basis. Since the question of the weight to be accorded competing pieces of evidence is clearly for the Commission, *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359 (1936), Issue No. 20 must be resolved against the Transcontinental lines.

[fol. 1762] Conclusions re Issue No. 21

57. The only issue in this Court relevant to the Commission's use of the 7-day study empty-return ratios for general-purpose box cars is whether the ratios used are supported by substantial evidence in the record as made. In the Commission proceedings, the burden of the Eastern and Midwestern lines was simply to submit substantial evidence in support of the empty-return ratios which they used; they did not have the burden of amassing and submitting evidence which would negative theories of the Transcontinental lines. The 7-day studies were supported by substantial evidence and were shown to produce reliable results. Therefore, the Eastern and Midwestern lines were under no obligation to submit any additional evidence.

58. Before the Court can be called upon to decide what were the duties and obligations of the Eastern and Midwestern lines with respect to coming forward with addi-

tional data pertinent to empty-return ratios, or to decide whether those railroads failed in that duty, it must appear that those railroads actually withheld vital evidence. The Commission found that no evidence vital to their burden of proof had been withheld. That finding is supported by the record.

59. Since the answer to the first question presented in plaintiffs' Issue No. 21 is in the negative, this obviates any necessity for considering questions B and C stated in that issue.

Conclusion re Issue No. 22

60. This issue must be decided against the Transcontinental lines for reasons similar to those discussed under Issue No. 21. In deciding to use the 7-day study empty-return basis in its restatement of the Transcontinental lines' cost study, the Commission relied on evidence which was substantial, appropriate and reliable to support that basis. The Commission so found. The Commission's statement in its report that it "is not clear" whether it can require ad- [fol. 1763] ditional data to be submitted by the Eastern and Midwestern lines is akin to the judicial practice of commenting on the uncertain state of law as to an issue which the court did not reach. Having determined that the evidence of record was substantial, appropriate and reliable, questions of fact which it was within the competence of the Commission to determine, *Illinois Commerce Commission* v. *United States,* 292 U.S. 480, 481, 484 (1934), the Commission did not reach the uncertain question as to whether it could require additional data. Thus, Issue No. 22 must be resolved against the Transcontinental lines.

Conclusion re Issue No. 23

61. As has previously been shown in connection with Issues Nos. 21 and 22, the Midwestern and Eastern lines were under no obligation to make the studies requested by the Transcontinental railroads and the Commission was under

no obligation to compel them to make such studies. Inasmuch as the use of the 7-day study was supported by substantial evidence, the Commission made an allowable judgment in giving controlling weight to that study, rather than to the special studies submitted by the Transcontinental lines or, indeed, by the Midwestern and Eastern lines.

Conclusion re Issue No. 24

62. Giving consideration to the relative unimportance of the issue raised by the Transcontinental lines with respect to the empty return of special-purpose box cars, it is apparent that the Commission placed the issue raised in the Commission proceeding by the Transcontinental lines in proper context. The Commission's action was neither arbitrary nor without support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act. In any event, there was no injury to the Transcontinental lines on account of any error in the Commission's action, since the empty-return ratios used by the Commission for auto-parts cars in its restatement produce [fol. 1764] service units which are in substantially the same proportion for the Transcontinental lines as the assumed ratios which they urge should have been used. Harmless errors—that is, errors which have no substantial bearing on the ultimate rights of the parties—are to be disregarded. *Attorney General's Manual on the Administrative Procedure Act* (1947) at 110. *Sisto* v. *Civil Aeronautics Board,* 179 F. 2d 47 (C.A. D.C., 1949). An error complained of must be found to have constituted prejudicial error within the meaning of Section 10(e) of the Administrative Procedure Act before Commission action can be set aside. *Watson Bros. Transportation Co.* v. *United States,* 180 F. Supp. 732, 740 (Neb., 1960).

Conclusion re Issue No. 25

63. Ignoring the substantial evidence and elaborate subsidiary findings made by the Commission on the many facets

of the roadway maintenance and return issue, the Transcontinental lines focus attention on the single sentence of the supplemental report that "These [main] lines [in the Midwest] are used by bridge traffic, and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves." (322 I.C.C. at 496) The Transcontinental lines contend that there is an issue which this Court must decide as to whether the Commission relied "in any substantial part upon a finding that transcontinental traffic moves over the various categories of lines of the Midwestern railroads in the same degree as the average of all traffic; * * *" The Commission made no finding in the terms stated by the Transcontinental lines; the Commission merely said that the involved traffic should be charged with its proportionate share of maintaining the lines over which that traffic moves, after having stated the simple mathematical proposition that the smaller the divisor (gross-ton-miles) the larger the cost per gross-ton-mile. On either the Transcontinental lines' basis or the Rail Form A basis, the variable costs per gross-ton-[fol. 1765] mile of the involved traffic do not change dependent on whether the traffic moves over heavy or light density lines. In both the initial and supplemental reports the Commission exhaustively analyzed the bases for measuring the variable costs per gross-ton-mile, and concluded that the Rail Form A basis, which produced a higher variable cost in the Midwest than in the Mountain-Pacific Territory, properly reflected the variable costs to be assigned to the traffic on main lines and branch lines. There are no grounds stated by the Transcontinental lines for setting aside the Commission's order.

Conclusions re Issue No. 26

64. The Commission found that Rail Form A railroad group costs should be used in its restatement of the Transcontinental lines' study. A number of reasons, supported by substantial evidence, were stated in explanation of the Commission's determination to assign locomotive expense

and car costs on the basis of Rail Form A railroad group costs.

65. In the case of locomotive costs, the finding that the costs assigned to the involved traffic should be on a gross-ton-mile basis by railroad groups is fully corroborated by the Transcontinental lines' own evidence wherein they submitted a fuel-consumed basis to assign locomotive costs. Contrary to the Transcontinental lines' contention here, the Commission did not rely on the relative size of engine districts in the East and the West to support its use of the gross-ton-mile basis for locomotive costs.

66. With respect to car costs, the Commission's findings that its restated basis recognized differences in costs among the territories is fully supported by other facts and reasons given by the Commission, without regard to the Commission's reference to the contention of the Eastern lines that there is a difference in the size of engine districts in the East and in the West. Since there is ample basis for [fol. 1766] the Commission's finding as to car costs without the statement as to relative sizes of engine districts, the conclusion of the Commission should not be set aside. *National L. R. Bd.* v. *Newport News S. B. & D. D. Co.*, 308 U.S. 241, 247 (1939). Assuming, *arguendo*, that the Commission's reliance on relative size of engine districts as a partial explanation for different car costs among railroad groups was misplaced, its reliance in this respect was not vital to its decision and, therefore, would afford no ground for setting aside the Commission's order. *William N. Feinstein* v. *United States*, 317 F. 2d 509, 512-13 (CA 2d 1963), affirming 209 F. Supp. 613, 623 (S.D. N.Y. 1962).

Conclusions re Issue No. 27

67. The Commission's determination to use the 7-day study ratios for the empty return of refrigerator cars was one of the bases for its cost findings. Section 8(b) of the Administrative Procedure Act does not require the Commission to state, in turn, the basis or reason for a basis.

68. Assuming, *arguendo,* that the Commission must state such a basis or reason, the issue is then whether or not it did so. The Transcontinental lines contend that the Commission's only statement with respect to the use of the 7-day study basis for empty-return ratios of refrigerator cars was a recital of the contentions of the parties. They ignore the findings and reasons given by the Commission with respect to the appropriateness and reliability of the 7-day studies. Those findings and reasons apply to the refrigerator car traffic as well as to box car traffic. Accordingly, even under the Transcontinental lines' theory of the meaning of Section 8(b), the Commission stated the findings and the reasons or bases therefor. That the Commission in addition stated the contentions of the Eastern and Midwestern lines as to deficiencies in the studies of the Transcontinental lines does not detract from the positive findings and reasons which the Commission gave in support of its use of the 7-day study ratios.

[fol. 1767]

Conclusion re Issue No. 28

69. The Commission gave rational reasons for giving controlling weight to the elements of value property base rather than to the net book investment, as the basis for computing return as a cost to be applied to the involved traffic. The elements of value are determined by the use of valuation data published by the Commission. They are well understood by all parties to these proceedings as is indicated by the evidence, pro and con, submitted with respect thereto. They have been used for many years as the base for computing return in cost studies presented in evidence in commodity rate cases, class rate cases, and interterritorial divisions cases. There is no occasion for the Commission to explain elements of value in detail in every case in which it is used. There is substantial evidence to support the use which the Commission made of elements of value in the instant case and there was no abuse of discretion on the part of the Commission.

Conclusion re Issue No. 29

70. The Rail Form A railroad group cost bases used by the Commission in its restatement of empty return ratios, roadway expense and return costs, locomotive costs, car costs, and basis for the calculation of return on property in its restatement of the Transcontinental lines' cost study are shown to be rational and supported by substantial evidence.

Final Conclusions

71. The orders of the Commission here under attack are valid in all respects and should be sustained; and all complaints, amended complaints and supplemental complaints should be dismissed.

72. The interlocutory injunction in paragraph numbered 1 of the Judgment for Interlocutory Injunction made under date of August 3, 1963, and the interlocutory injunction in paragraph numbered 1 of the Judgment for [fol. 1768] Interlocutory Injunction on Supplemental Complaint and on Amended Complaint made under date of March 21, 1964, should be vacated and dissolved; and this Court should continue to reserve jurisdiction with respect to the remaining matters contained in said Judgments.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged, and Decreed:

1. That the interlocutory injunction in paragraph numbered 1 of the Judgment for Interlocutory Injunction made under date of August 3, 1963, and the interlocutory injunction in paragraph numbered 1 of the Judgment for Interlocutory Injunction on Supplemental Complaint and on Amended Complaint made under date of March 21, 1964, be and they are hereby vacated and dissolved.

2. That this Court hereby continues to reserve jurisdiction over all other matters in the foregoing Judgments.

3. That all complaints, amended complaints, and supplemental complaints in this action be and they are hereby dismissed.

Dated:

Stanley N. Barnes, United States Circuit Judge;
William C. Mathes, United States District Judge;
E. Avery Crary, United States District Judge;

Respectfully submitted,

Thomas R. Sheridan, United States Attorney, 600 Federal Bldg., Los Angeles, California 90012, Telephone: 688-2000, Ext. 2419;

William H. Orrick, Jr., Assistant Attorney General;

John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20423;

Robert W. Ginnane, General Counsel;

[fol. 1769] Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, By Arthur J. Cerra, Attorneys for Defendants United States of America and Interstate Commerce Commission;

Joseph F. Eshelman, 1600 Three Penn Center Plaza, Philadelphia, Pa. 19102;

Edward A. Kaier, 1138 Six Penn Center Plaza, Philadelphia, Pa. 19103;

Kenneth H. Lundmark, 466 Lexington Ave., New York, N. Y. 10017;

Thelen, Marrin, Johnson & Bridges, Gordon Johnson, James W. Baldwin, 811 West Seventh Street, Suite 1005, Los Angeles, California, 90017, By

James W. Baldwin, Attorneys for Intervening Defendants, The Baltimore and Ohio Railroad Co. et al.;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago, Illinois, 60603;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, Daniel J. Sweeney, One North LaSalle Street, Suite 330, Chicago, Illinois, 60602;

Nye F. Morehouse, 400 West Madison Street, Suite 836, Chicago, Illinois, 60606;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles, California, 90017, By Frank R. Johnston, Attorneys for Intervening Defendants, Chicago and North Western Railway Co. et al.;

Raymond K. Merrill, 888 Union Station Bldg., 516 W. Jackson Blvd., Chicago, Illinois 60606;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles, California 90017; By Joe Cummins, Attorneys for Intervening Defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

November 2, 1964

APPENDIX A

Between Pacific Coast Points (Group W-1) and	Eastern Divisions via Chicago		Western Divisions via Chicago	
	Present	Prescribed	Present	Prescribed
New England-Seaboard (New York, N.Y.)	27.5%	34%	72.5%	66%
Trunkline Interior (Syracuse, N.Y.)	25	28	75	72
Bessemer, Pa.	18	22	82	78
Buffalo-Pittsburgh	16.5		83.5	
Cincinnati-Detroit (Northern)	16	17	84	83
Cincinnati-Detroit (Southern)	13		87	
Southeastern Illinois (Evansville, Ind.)	6-12	15	88-94	85

Between Pacific Coast Points (Group W-1) and	Eastern Divisions via St. Louis		Western Divisions via St. Louis	
	Present	Prescribed	Present	Prescribed
New England-Seaboard (New York, N.Y.)	31.5%	37%	68.5%	63%
Trunkline Interior (Syracuse, N.Y.)	29	31	71	69
Bessemer, Pa.	21.5	25	78.5	75
Buffalo-Pittsburgh	20		80	
Cincinnati-Detroit (Northern)	19.5	19	80.5	81
Cincinnati-Detroit (Southern)	16.5		83.5	
Southeastern Illinois (Evansville, Ind.)	6-12	15	88-94	85

APPENDIX B

Between New York and	Midwestern Haul	Present Midwestern Divisions	Prescribed Midwestern Divisions
Seattle	Chicago-Twin Cities	12 %	12%
Seattle	Chicago-Council Bluffs	12	13
San Francisco	Chicago-Council Bluffs	12	13
San Francisco	Chicago-Kansas City	12	11
Los Angeles	Chicago-Council Bluffs	12	13
Los Angeles	Chicago-Kansas City	12	12
San Francisco	Chicago-Santa Rosa, N.M.	32.3	24
Los Angeles	Chicago-Santa Rosa, N.M.	32.3	28
San Francisco	St. Louis-Pueblo	21.2	23
Los Angeles	St. Louis-Pueblo	19.4	25
San Francisco	St. Louis-Kansas City	8.3	8
Los Angeles	St. Louis-Kansas City	8.3	9
San Francisco	St. Louis-El Paso	34.9	28
Los Angeles	St. Louis-El Paso	34.9	33

[fol. 1771]

APPENDIX C

Between	Midwestern Haul	Midwestern Lines' Divisions		Transcontinental Lines' Divisions	
		Present	Prescribed	Present	Prescribed
Chicago and Seattle	Chicago-Twin Cities	16.5%	21%	83.5%	79%
Chicago and San Francisco	Chicago-Council Bluffs	16.5	22	83.5	78
Chicago and Los Angeles	Chicago-Kansas City	16.5	21	83.5	79
Chicago and Los Angeles	Chicago-Santa Rosa, N.M.	44.5	44	55.5	56
St. Louis and Seattle	St. Louis-Twin Cities	18.5	24	81.5	76
St. Louis and San Francisco	St. Louis-Pueblo	30.9	38	69.1	62
St. Louis and Los Angeles	St. Louis-Kansas City	12.1	17	87.9	83
St. Louis and Los Angeles	St. Louis-El Paso	51	55	49	45
Memphis and San Francisco	Memphis-Kansas City	16.5	20	83.5	80
Memphis and Los Angeles	Memphis-Kansas City	16.5	22	83.5	78
Kansas City and Los Angeles	Kansas City-El Paso	47.3	50	52.7	50
Okla. City and San Francisco	Okla. City-Kansas City	20	14	80	86
Okla. City and Los Angeles	Okla. City-El Paso	47.3	45	52.7	55

[fol. 1772]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFFS AND INTERVENING PLAINTIFFS—Lodged November 2, 1964

This action came on for hearing on November 19, 1964, before the Honorable Stanley N. Barnes, Circuit Judge, and the Honorable William C. Mathes and the Honorable E. Avery Crary, District Judges, sitting as a district court of three judges appointed pursuant to the provisions of 28 U.S.C. §2284. The Clerk of the Court gave at least five days' notice of said hearing to the Attorney General of the United States, to the United States Attorney for the [fol. 1773] Southern District of California, and to defendants and intervening defendants, in accordance with 28 U.S.C. §2284(2). Plaintiffs, intervening plaintiffs, defendants and intervening defendants were represented at the hearing by their attorneys of record, and the matter was heard upon the pleadings, the briefs of the parties and the copy of the record certified by the Interstate Commerce Commission in its Docket 31503 and Sub Nos. and received as an exhibit by this court.

[File endorsement omitted]

Now, Therefore, the Court, having heard oral argument and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. Background Facts

1. This is an action to set aside and enjoin orders entered by the Interstate Commerce Commission (hereinafter referred to as the Commission) in its Docket 31503 and Sub Nos., *Akron, Canton & Youngstown R. Co. et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*, 321 I.C.C. 17 and 322 I.C.C. 491. These orders prescribed new divisions of joint rail rates on transcontinental freight traffic.

2. The transcontinental freight traffic subject to the Commission's orders consists of shipments moving between rail stations in the western portion of Mountain-Pacific territory and stations in Eastern and Midwestern territory. Mountain-Pacific territory embraces generally all of the eleven far western states, excluding the southeastern corner of Wyoming, eastern Colorado and eastern New Mexico. Eastern (Official) territory lies generally east of Lake [fol. 1774] Michigan, Chicago, Peoria, St. Louis and Cairo, Illinois, and north of the Ohio River. Midwestern territory is generally the area between Eastern territory and points on the Mississippi River south of Cairo, Illinois, on the one hand, and Mountain-Pacific territory, on the other.

3. Plaintiffs are eleven railroads operating in Mountain-Pacific territory. Seven of plaintiff railroads operate lines of railroad in the Southern District of California and four of those plaintiffs also have their principal offices within the Southern District of California. Intervening as plaintiffs are forty-five additional railroads serving Mountain-Pacific territory (Amador Central *et al.*). Plaintiffs and these intervening plaintiffs are referred to as Mountain-Pacific railroads and also as transcontinental railroads.

Two railroads operating in Midwestern territory (the St. Louis-San Francisco Railway Co. and the Missouri-Kansas-Texas Railroad Co.) also intervened as plaintiffs. The People of the State of California and the California Public Utilities Commission also intervened as plaintiffs. The state regulatory agencies responsible for regulating rail transportation in nine Mountain-Pacific states each intervened as plaintiffs in this proceeding.

4. Defendants are the United States of America and the Interstate Commerce Commission. Intervening as defendants are a group of railroads operating in Eastern territory (Baltimore and Ohio R. Co. *et al.*) and a group of railroads operating in Midwestern territory (Chicago & North Western Ry. Co. *et al.*).

[fol. 1775] 5. Transcontinental freight traffic generally requires the participation of two or more railroads and moves on joint rates under which the shipper pays a single sum. Divisions are the respective shares of this sum received by each participating railroad for its part of the joint service. Transcontinental freight traffic yields well over $1 billion in annual revenue (321 I.C.C. at 21, 24). The present divisions of transcontinental freight revenues account for nearly half of the total freight revenues of the Mountain-Pacific railroads, 15 percent of that of the Midwestern railroads and 6 percent of that of the Eastern railroads (321 I.C.C. at 33). The present divisions of the Eastern railroads on transcontinental freight are based upon agreements of the participating railroads. The Eastern railroads are presently receiving a share of the joint revenue from East-transcontinental traffic which is equal to their share of the ton-miles performed in handling that traffic (321 I.C.C. at 21). The present divisions of the Midwestern railroads on transcontinental freight are also based upon agreements, the most important of which were considered in a 1934 decision of the Commission which found that the divisions had not been shown to be unlawful.

6. Proceedings before the Commission were initiated by complaint of the Eastern railroads seeking an increase in their divisions of transcontinental freight revenues. The Midwestern railroads also sought an increase in their divisions, both on transcontinental traffic to and from stations in Midwestern territory, and on transcontinental traffic to and from stations in Eastern territory in which the Midwestern railroads participate as intermediate carriers.

[fol. 1776] 7. The Commission issued its report and order dated March 21, 1963, as amended by its order dated June 20, 1963, prescribing new divisions of transcontinental freight revenues effective July 1, 1963. This order would generally increase the divisions of the Eastern and Midwestern railroads and decrease the divisions of the Mountain-Pacific railroads. After the filing of petitions for reconsideration and rehearing, the Commission issued a supplemental report dated December 31, 1963, together with an order prescribing divisions of transcontinental freight revenues effective March 31, 1964. The divisions prescribed in the latter order of the Commission are, with minor exceptions, the same as the divisions which had been prescribed effective July 1, 1963.

II. Absence of Findings or Consideration as to the Amount of Revenue Required by the Respective Carriers, the Financial Effect of the Commission's Orders, and the Extent to Which the Divisions Being Prescribed Produce the Amount of Revenue Required (Issues Nos. 1-5)

8. The Commission described the new divisions as designed to "reflect certain broader aspects of revenue needs" of the railroads which participate in the handling of transcontinental freight traffic (321 I.C.C. at 70). The Commission did not find, in dollars or otherwise, the amount of revenue required by the participating railroads to pay their respective operating expenses, taxes, and a fair re-

[fol. 1777] turn on their railway property held for and used in the service of transportation. The Commission also did not find the financial effect that the divisions being prescribed would have upon the participating railroads, or the extent to which the divisions being prescribed would produce the amount of revenues required by the participating railroads; and there was no evidence in the record from which the financial effect upon the participating carriers of the divisions being prescribed could be determined.

9. Such findings as the Commission did make on the general subject of revenue needs were stated on a railroad group basis, and the Commission did not find the amount of revenue required by individual carriers, the financial effect upon individual carriers of the divisions being prescribed, or the extent to which the divisions being prescribed provide the amounts of revenue required by individual carriers. There was no evidence in the record from which the financial effect upon individual carriers of the divisions being prescribed could be determined.

10. The Commission referred in its reports to three railroads in connection with the effect of its orders (namely, the St. Louis-San Francisco Railway Co., the Missouri-Kansas-Texas Railroad Co., and the Denver & Rio Grande Railroad Co.), but the Commission did not find the financial effect of its order upon those individual railroads. With respect to the Missouri-Kansas-Texas Railroad Co. and the St. Louis-San Francisco Railway Co., the Commission stated in its supplemental report that it saw no reason for making a special exception from the [fol. 1778] divisions being prescribed for these railroads (322 I.C.C. at 518), even though in their petition for reconsideration and rehearing, the St. Louis-San Francisco Railway Co. had alleged that the new divisions would deprive it of substantially all of the net income it would otherwise receive, and the Missouri-Kansas-Texas Railroad Co. stated that these new divisions would convert its small net income currently earned into a substantial deficit.

The Commission stated that it would not consider the competitive conditions affecting the Denver & Rio Grande Railroad Co. because that railroad had joined with other Mountain-Pacific railroads in pointing out that divisions over Utah gateways and subdivisions within Mountain-Pacific Territory "were extraneous to the issues" raised by the pleadings (322 I.C.C. at 510).

III. Absence of Essential Evidence, Findings, and Statements of Reasons or Basis to Support the Particular Divisions Prescribed by the Commission (Issues No. 6-11)

11. The new divisions of transcontinental freight rates which the Commission prescribed for the Eastern lines are in the form of 75 individual percentages separately applicable to freight traffic moving between each of five defined areas of the East (Groups E-1 through E-5) and five defined areas in Mountain-Pacific territory (Groups W-1 through W-5) through three sets of interterritorial gateways (Chicago, Peoria and St. Louis). (322 I.C.C. at 522-524). The prescribed percentages would increase the divisions of the Eastern lines in each instance, but the in- [fol. 1779] creases thus prescribed would not be uniform. Except for the 15 percent minimum division, the Commission did not state any reasons or bases for any of the particular percentages which it prescribed.

12. The Commission based its prescription of a 15 percent minimum division for the Eastern lines upon findings of (a) increasingly burdensome terminal costs for recent years and (b) a common practice of using a 15 percent minimum division (321 I.C.C. at 74-75). The evidence of terminal costs most favorable to defendants (Government Brf. p. 60) would justify a minimum percentage of no more than 7 percent for the short-haul carrier on the transcontinental traffic involved in these proceedings. There was no evidence of a common practice, or even a single

instance, where a 15 percent minimum division has been used for the short-haul carrier in a haul of the length characteristic of transcontinental traffic.

13. The Commission's reports contain no findings that evidence before it with respect to rates, present divisions and services performed was typical of transcontinental traffic for which new divisions were prescribed. The Commission prescribed some new percentage divisions for which the record contained no evidence at all as to the rates, present divisions, and services performed. As to other newly prescribed percentage divisions, the only evidence in the record related to a single commodity which no party contended was typical of all commodities covered by the prescribed divisions.

14. The Commission did not find the terminal costs in- [fol. 1780] curred by any of the railroads.

15. The scales which the Commission prescribed for calculation of the divisions between the Midwestern and Mountain-Pacific railroads contained specific allowances in addition to the factors accounted for by the mileage haul. An allowance equivalent to 221 miles was included in the scales of divisional factors prescribed by the Commission for Mountain-Pacific and Midwestern railroads that perform origin or destination terminal service (322 I.C.C. at 525, columns 1 and 3). An allowance equivalent to 112½ miles of service was included in the scales for railroads performing no origin or destination terminal service on intermediate hauls in Midwestern territory (322 I.C.C. at 525, column 2). The Commission did not state any reasons or bases under any of the standards specified and embraced in Section 15(6) for providing a terminal factor allowance equivalent to 221 miles for railroads performing origin or destination terminal service, or for providing an allowance of 112½ miles for railroads performing intermediate service in Midwestern territory, but no origin or destination terminal service.

16. The Commission's reports do not contain any explanation which relates the factors in the divisional scales prescribed to any of the standards specified and embraced in Section 15(6) of the Interstate Commerce Act.

[fol. 1781]

IV. Absence of Substantial Evidence and Statement of Reasons or Basis to Support Conclusions Upon Which the Commission Relied (Issues Nos. 12-13)

17. In concluding that the present divisions of the Midwestern railroads are too low and in prescribing new divisions on a higher level, the Commission stated as one of the reasons for its action that the percentage of transcontinental traffic on which the Midwestern railroads performed only "overhead" (intermediate) service had declined since 1934 (321 I.C.C. at 72). There is no evidence to support this finding.

18. The Commission did not state the reasons or bases for its conclusion on the issue of relative efficiency that "none of the contending groups is more or less efficiently operated than other" (321 I.C.C. at 68). The Mountain-Pacific railroads contested this issue in the proceedings before the Commission.

V. Absence of Findings, Substantial Evidence, and a Full and Fair Hearing With Respect to the Commission's Treatment of Passenger Deficits (Issues Nos. 14-19)

19. The issue as to the revenue required by the respective railroads, as it was actually litigated before the Commission in these proceedings, concerned the entire opera-[fol. 1782] tion of the railroads in providing all transportation service. The Eastern and Midwestern railroads claimed greater revenue requirements than the Mountain-Pacific railroads on the theory that their rates of return on investment for all transportation services were, on the average, somewhat lower in recent years than those of the

Mountain-Pacific railroads. The Mountain-Pacific railroads claimed greater revenue requirements than the Eastern and Midwestern railroads on the theory that the economic growth of the Western States had imposed an obligation upon them to make substantial new investments in transportation facilities, which investments could not be compensated for by increased earnings, and which left the Mountain-Pacific railroads with substantially lower actual returns than those of either the Eastern or Midwestern railroads. The Commission did not state such conclusions as it did on the subject of revenue needs in terms of the claims of either group of railroads related to all transportation service. Instead, the Commission stated that the passenger deficits of the Mountain-Pacific railroads were unduly high, and, from that premise, it proceeded to state such conclusions as it did on the general relativity of revenue needs in terms of revenue needs "as freight carriers," thereby eliminating revenue requirements represented by passenger deficits.

20. The Commission's reports contain no findings with respect to property held for and used in freight transportation service by the respective railroads, or with respect to the fairness of the returns represented by the freight earnings upon which the Commission relied. There was no evidence in the record from which the Commission could have made these findings.

[fol. 1783] 21. The Commission did not state reasons or bases for its reliance upon trends showing greater increases in the passenger deficits of the Mountain-Pacific railroads as indicating lesser revenue requirements on the part of those railroads. The Commission did not state any reason or basis explaining why it refused to follow in this divisions case the principle that it had adopted in rate cases recognizing the necessity of meeting all of the revenue requirements of the railroads, including those represented by passenger deficits.

22. The absence of findings with respect to the Commission's reliance upon freight net railway operating income occurred in the context of a record which did not contain evidence necessary to permit an evaluation of the relationship between passenger deficits and the railroads' actual revenue requirements. The freight net railway operating income of any railroad represents the amount by which the freight revenues of that railroad exceed the sum of the expenses solely related to freight service plus an allocated portion of expenses common to both freight and passenger service. The passenger deficit of a railroad represents the amount by which passenger revenues fail to cover the sum of the expenses solely related to passenger service and the portion of the common expenses allocated to passenger service. Expenses common to both freight service and passenger service are allocated between these two services in accordance with separation rules established by the Commission for accounting purposes, and these rules do not purport to measure the proportion of common expenses that could be avoided by discontinuance [fol. 1784] of the service to which they are allocated. The Commission eliminated revenue requirements represented by passenger deficits notwithstanding the following:

(a) There was no evidence as to the amount of expenses solely related to passenger service or the proportion of common expenses allocated to passenger service that could have been avoided by discontinuance of passenger service.

(b) There was no evidence that any passenger train operated by the Mountain-Pacific railroads failed to realize revenues at least equal to the expenses which could actually be saved by their discontinuance.

(c) There was no evidence by which the lawfulness of discontinuing any passenger train could have been determined from the standpoint either of the public or of the railroads.

(d) There was no evidence indicating the extent to which any railroad or group of railroads could have reduced their passenger deficits in the years in question.

(e) There was no evidence that the greater increases in the Mountain-Pacific railroads' passenger deficits were the result of their inefficiency, or that those railroads should have discontinued more of their passenger service, or that any other basis existed for the Commission's refusal to recognize revenue requirements represented by passenger deficits.

[fol. 1785] 23. In their Recommended Report, the Examiners injected into the case for the first time the concept that passenger deficits should be eliminated in considering relative revenue needs. In their Exceptions to the Examiners' Recommended Report, the Mountain-Pacific railroads and Mountain-Pacific state commissions objected to the Examiners' treatment of passenger deficit data on the ground, among others, that such reliance necessarily involved factual assumptions not supported by evidence. In support of their objection, the Mountain-Pacific railroads offered to prove:

(a) That the passenger deficits of the Eastern railroads were at an abnormally high level in the years immediately following World War II, whereas the Mountain-Pacific railroads had been diligently analyzing and discontinuing unprofitable passenger trains during that period.

(b) That the passenger business in the East is not comparable with the passenger business in Mountain-Pacific territory; the great number of passenger, including commuter, trains in the East, often running over separate passenger tracks, afforded opportunities for savings from passenger train discontinuances not available to the Mountain-Pacific railroads.

(c) That reduction of the passenger deficit does not produce actual dollar savings, but simply shifts the common expense to freight service (unless the passenger trains are operating at an out-of-pocket loss in which case the dollar savings are measured by the out-of-pocket loss); using the Commission's own stand-[fol. 1786] ard of determining out-of-pocket expenses, the passenger trains operated by the Mountain-Pacific railroads are producing a contribution of $26 million per year to their revenue needs.

(d) That there is no greater potential for actual savings in the passenger operations of the Mountain-Pacific railroads than there is for the Eastern and Midwestern railroads.

(e) That passenger trains cannot be discontinued without regard to the public need which must be considered with respect to individual trains.

In support of their Exceptions, the Mountain-Pacific state commissions offered to prove, on the basis of data showing passenger service discontinuances which took place between 1950 and 1960, that they had acted to minimize the passenger deficits in their territory whenever the public interest permitted. The Commission did not afford either the Mountain-Pacific railroads or the Mountain-Pacific state commissions an opportunity to prove said matters, and the Commission made no mention of those offers of proof in its report. In their petitions for reconsideration, the Mountain-Pacific railroads and the Mountain-Pacific state commissions asked the Commission to reconsider this action, but the Commission did not refer to that request in its supplemental report.

24. The Commission refused to recognize any difference in the needs of the various groups of railroads for funds for additions, betterments, and new equipment, but it did [fol. 1787] not state any reasons or bases for its refusal.

VI. Absence of Substantial Evidence, Findings, and Statements of Reasons or Bases to Support the Commission's Treatment of Cost of Service (Issues Nos. 20-29)

25. The Mountain-Pacific railroads offered a cost study for the purpose of measuring the costs incurred by the participating railroads in handling transcontinental freight traffic. The Commission accepted this cost study as the basis for its resolution of the cost of service issue, with changes contained in a "Restatement" thereof. One of the changes made in the Mountain-Pacific lines' cost study was the Commission's use of costs on an "aggregate" basis instead of on a "shipment-by-shipment" basis. The "shipment-by-shipment" approach used by the Mountain-Pacific railroads in their study showed the percentage of revenue the participating railroads would receive if each rate had been divided on the basis of the percentage of the costs for each shipment. The cost approach substituted by the Commission aggregated all of the costs incurred on transcontinental freight traffic and showed for each group of railroads the percentage of revenue it would have received if the total revenues had been divided in accordance with the percentage each group bore of the "aggregate" costs. The substitution of the "aggregate" cost approach for the "shipment-by-shipment" cost approach was a contested issue which accounted for one-third of the difference between the percentage of costs indicated for the Eastern [fol. 1788] railroads in the Mountain-Pacific railroads' cost study and the percentage indicated for the Eastern railroads under the Commission's restatement of that study. The Commission stated that it used the "aggregate" cost method but did not state any reason or basis for its action.

26. The Commission's "Restatement" of the Mountain-Pacific railroads' cost study also included the use of Rail Form A railroad group average costs for six of the elements of that study. With respect to one of these elements, the Commission substituted empty return ratios represent-

ing the average of all freight traffic moving in each type of car instead of the empty return ratios which the Mountain-Pacific railroads offered as measuring the empty return ratios experienced in handling transcontinental freight traffic. With respect to "general purpose box car" empty return ratios, the Commission found that railroad group average data should be substituted because, although the Mountain-Pacific railroads had made an adequate study of empty return ratios experienced in handling transcontinental freight traffic on their own lines, they had been unable to develop comparable data for the Eastern and Midwestern railroads by reason of the fact that such data, which were in the sole possession of the Eastern and Midwestern railroads, were not available to the Mountain-Pacific railroads (321 I.C.C. at 36). The Commission found that, in the absence of comparable empty return data for the Eastern and Midwestern railroads, its only recourse was to use territorial average data, because the Eastern and Midwestern railroads were under no obligation to come forward with cost data not necessary to their own concept [fol. 1789] of the issues, and the Commission doubted its power to require the production of such data (322 I.C.C. at 493). The substitution of Rail Form A railroad group average empty return ratios on "general purpose box cars" for the data used by the Mountain-Pacific railroads in their study produced a substantial increase in the cost percentages of the Eastern and Midwestern railroads and a corresponding decrease in the cost percentage of the Mountain-Pacific railroads.

27. With respect to "special purpose box cars" (principally cars carrying automobile parts), the Commission used Rail Form A railroad group average empty return ratios, thus attributing to the Eastern railroads empty return ratios higher than those attributed to the Mountain-Pacific railroads. Uncontroverted evidence shows that the empty return ratios actually experienced on "special purpose box cars" are the same (100% for all practical purposes) in all territories.

28. The Commission also used Rail Form A railroad group average expenses for maintenance of way and structures. The expenses used by the Commission impute to transcontinental traffic a proportion of the costs of maintaining all Midwestern lines, including branch lines and secondary main lines. The record shows that transcontinental traffic moves over low cost, high density main lines, such as the Chicago & North Western Railway's main line between Chicago and Council Bluffs, Iowa, in far greater proportion than it moves over branch lines or secondary main lines, such as the Chicago & North Western's secondary main line to Lander, Wyoming.

[fol. 1790] 29. The Commission also used Rail Form A railroad group average locomotive and car costs in its restatement of the Mountain-Pacific railroads' study. The effect of this action was to attribute to the Eastern railroads locomotive costs 35% higher than those recognized for the Western railroads and car costs 40% higher than those recognized for the Western railroads. One of the grounds relied upon in substantial part by the Commission in support of its use of territorial average locomotive and car costs was its finding of "average miles per engine district of 90.7 in the East and 109.0 in the West" (321 I.C.C. at 44). These figures measuring the relative size of engine districts in the East and the West are erroneous because of a clerical error admitted by the witness who placed them in the record. There is no evidence in the record to support the Commission's assumption that the size of engine districts affects either locomotive costs or car costs.

30. With respect to refrigerator cars, the Commission used Rail Form A railroad group average empty return ratios in its determination of cost of service. The Commission recited criticisms which had been directed at the ratios developed in the Mountain-Pacific railroads' study, but it did not state the reasons or basis for its use of average empty return ratios for refrigerator cars.

31. As the basis for computing the return on investment included in its determination of cost of service, the Commission used return based upon a formula, known as "Elements of Value," which consists of (1) "reproduction cost" at the 1914 price level for railroad property in existence [fol. 1791] on the date of valuation; (2) actual cost of property placed in service after that date; (3) "present value" of land; and (4) a theoretical calculation of cash and materials and supplies. The Commission did not state any standard for measuring the cost element related to the property base of the carriers in divisions proceedings, and the Commission did not state, in any other form, reasons or bases supporting its use of the "Elements of Value" formula.

32. The findings of the Commission with respect to empty return ratios, maintenance of way and structure costs, locomotive costs and property base do not justify the use of Rail Form A railroad group average costs, even if everything stated by the Commission with respect to these cost elements were accepted at face value. The Commission's findings, taken at face value, would indicate costs somewhere between the data used in the Mountain-Pacific railroads' cost study and the Rail Form A railroad group averages used by the Commission, but, in no instance, did the Commission make findings with respect to any alternative or middle ground.

[fol. 1792] Conclusions of Law

I. General Conclusions

1. This Court has jurisdiction, under 5 U.S.C. § 1009 and 28 U.S.C. §§ 1336, 2284, 2321-2325, to suspend, enjoin, annul and set aside the enforcement, operation and execution of orders of the Interstate Commerce Commission.

2. The venue of this action is properly laid in the Southern District of California under 28 U.S.C. § 1398.

3. It is the statutory duty of the reviewing Court to set aside administrative decisions which do not contain a statement of the findings and conclusions of the agency, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, 5 U.S.C. § 1007(b), or where findings made by the agency are not supported by substantial evidence, 5 U.S.C. § 1009(e). *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167-168 (1962). The complexity and difficulty of an issue does not justify relaxation of the requirement of reasoned findings, but makes it the more imperative that such findings be made. *Mississippi River Fuel Corp.* v. *F.P.C.,* 163 F.2d 433, 439 (D.C. Cir. 1947).

4. The statutory requirements that the Commission make reasoned findings supported by evidence, and that administrative action which is arbitrary, capricious, an abuse of discretion, or otherwise unlawful be set aside, are fully applicable to the Commission's prescription of divisions of [fol. 1793] railroad revenues. 5 U.S.C. § 1007(b); 5 U.S.C. § 1009(e). *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 606-607 (D. Colo. 1964).

5. The reviewing Court must judge the propriety of administrative action solely on the grounds invoked by the agency and, if those grounds are inadequate or improper, the administrative action must be set aside. *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-169 (1962).

6. Enforcement of the statutory requirement that administrative action be upheld, if at all, on the basis of reasoned findings made by the agency is entirely consonant with, and protects, the discretion of an administrative agency, including the discretion of the Commission to evaluate and weigh the importance to be attached in any given case to the elements bearing upon the determination of lawful divisions of railroad revenues. *Burlington Truck*

Lines v. *United States,* 371 U.S. 156, 168-169 (1962); *Boston & Maine R. Co.* v. *United States,* 208 F.Supp. 661, 671, 675 (D. Mass. 1962), *aff'd,* 371 U.S. 26 (1962); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 604 (D. Colo. 1964).

[fol. 1794]

II. The Unlawfulness of the Commission's Failure to Find or Consider the Amount of Revenue Required, the Financial Effect of the Commission's Orders, and the Extent to Which the Divisions Being Prescribed Produce the Amount of Revenue Required (Issues Nos. 1-5)

7. Section 15(6) of the Interstate Commerce Act provides that the Commission shall give "due consideration" to the "amount of revenue required" by the carriers participating in the handling of transcontinental traffic to pay their respective "operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." 49 U.S.C. § 15(6). In a proceeding under Section 15(6), the "amount of revenue required" by the participating carriers, the financial effect of the divisions being prescribed and the extent to which such divisions would provide the amounts required by those carriers are "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act, at least in a case where, as here, the Commission expressly relied upon "revenue needs" as a basis for the new divisions which it prescribed. The Commission violated Section 8(b) because it failed to find, in any form, the amounts of revenue required by the participating carriers, the financial effect of the divisions being prescribed, or the extent to which such divisions would provide the amounts required by those carriers. 5 U.S.C. § 1007(b); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 605-607 (D. Colo. 1964).

8. The Commission also violated Section 15(6) of the [fol. 1795] Interstate Commerce Act in failing to give "due

consideration" to the amounts of revenue required by the participating carriers in light of the financial effect of the divisions being prescribed. 49 U.S.C. § 15(6). The Commission could not have given the required consideration in this case because the record contained no evidence from which the financial effect of the divisions being prescribed could be calculated.

9. At least in a case in which "revenue needs" are a basis for the divisions being prescribed, the amount of revenue required by individual carriers, the financial effect of the new divisions upon individual carriers, and the extent to which the new divisions provide the amount of revenue required by individual carriers are "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act. In failing to state findings and conclusions, as well as the reasons or bases therefor, upon such issues, the Commission violated Section 8(b). In failing to consider the justice, reasonableness and equity of the divisions being prescribed in light of the amounts of revenue required by the individual carriers, or to consider the financial effect upon individual carriers of those divisions, the Commission violated Section 15(6) of the Interstate Commerce Act. Said errors were not waived by plaintiffs or any of them. 5 U.S.C. § 1007(b); 49 U.S.C. § 15(6); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 605-607 (D. Colo. 1964).

[fol. 1796]

III. The Unlawfulness of the Commission's Failure to State Findings, as Well as the Reasons or Basis Therefor Upon a Record Adequate to Support the Particular Divisions Prescribed (Issues Nos. 6-11)

10. The power conferred by Congress upon the Commission is that of determining, in respect to particular joint rates, what divisions will be just, reasonable, and equitable in light of the standards specified and embraced in Section 15(6). The exercise of this power requires con-

sideration of the justice, reasonableness, and equity of the particular divisions prescribed, and not merely their aggregate overall effect. *United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 291 (1924); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 225 F.Supp. 584, 600, 605, 607 (D. Colo. 1964). The justice, reasonableness, and equity of particular percentages to be applied in dividing transcontinental freight rates were, therefore, material issues in the proceedings before the Commission. In failing to state the reasons or basis for any of the percentage divisions which it prescribed (except the 15 percent minimum), the Commission failed to state the "reasons or basis" for action upon "material issues" in violation of Section 8(b) of the Administrative Procedure Act. 5 U.S.C. § 1007(b). *Atchison, T. & S.F. Ry. Co.* v. *United States*, 225 F.Supp. 584, 606-607 (D. Colo. 1964).

11. The Commission's finding of a 15 percent minimum division for the Eastern lines is unlawful because it is not supported by substantial evidence. 5 U.S.C. § 1009(e).

[fol. 1797] 12. As a prerequisite to a lawful order changing divisions, the Commission must have before it evidence typical in character, and ample in quantity, to justify the findings and conclusions made in respect to each division of each rate of every carrier, and the necessary typical evidence was not in the record in this proceeding. In the absence of such typical evidence, the Commission did not find, nor could it reasonably deem, the record before it to be adequate. *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274, 291 (1924); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 225 F.Supp. 584, 591-600 (D. Colo. 1964).

13. Section 15(6) of the Interstate Commerce Act provides that, in prescribing new divisions, the Commission must give due consideration to whether any particular participating carrier is an originating, intermediate, or delivering line. In prescribing divisional scales which will determine the allowance, if any, to be made for terminal

service, the terminal costs incurred by participating railroads are "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act. In failing to state findings and conclusions, as well as the reasons or basis therefor, with respect to terminal costs, the Commission violated Section 8(b). 5 U.S.C. § 1007(b); 49 U.S.C. § 15(6); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 606-607 (D. Colo. 1964).

14. The inclusion in the scales prescribed to determine the divisions as between the Mountain-Pacific railroads and the Midwestern railroads of a factor equivalent to 221 miles for railroads performing terminal service and a [fol. 1798] factor equivalent to 112½ miles for railroads performing intermediate service in Midwestern territory materially affects the percentage divisions produced by those scales for the Mountain-Pacific railroads and the Midwestern railroads. In failing to state the "reasons or basis" for using terminal factor allowances equivalent to 221 miles for railroads performing origin and destination terminal service and equivalent to 112½ miles for railroads performing intermediate service in Midwestern territory the Commission failed to state the "reasons or basis" for findings and conclusions upon "material issues" in violation of Section 8(b) of the Administrative Procedure Act. 5 U.S.C. § 1007(b); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 606-607 (D. Colo. 1964).

15. The relationships between the factors in the divisional scales prescribed by the Commission and the standards specified and embraced in Section 15(6) of the Interstate Commerce Act were "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act. In failing to state findings and conclusions, as well as the reasons or basis therefor, which relate these scales to the standards of Section 15(6) in any manner, the Commission violated Section 8(b). 5 U.S.C. § 1007(b); 49 U.S.C. § 15(6); *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 606-607 (D. Colo. 1964).

[fol. 1799] IV. The Unlawfulness of the Commission's Reliance Upon Conclusions Not Supported by Substantial Evidence or Statements of Reasons or Basis (Issues Nos. 12-13)

16. The Commission's finding that there had been a decrease in the percentage of transcontinental traffic on which the Midwestern railroads performed only "overhead" (intermediate) service is unlawful because it is not supported by substantial evidence. 5 U.S.C. § 1009(e).

17. In failing to state the reasons or basis for its conclusion that "none of the contending groups is more or less efficiently operated than another," a conclusion made by the Commission in response to its obligation under Section 15(6) of the Interstate Commerce Act, the Commission failed to state the "reasons or basis" for a conclusion on a "material issue" in violation of Section 8(b) of the Administrative Procedure Act. *Atchison, T. & S.F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 606 (D. Colo. 1964). Intervening plaintiffs properly challenge in this Court the Commission's treatment of relative efficiency where the issue was raised before the Commission by other parties and the Commission expressly ruled on the issue. *Wilson & Co.* v. *United States,* 335 F.2d 788, 794 (7th Cir., 1964); *Hennessy* v. *S.E.C.,* 285 F.2d 511, 514-515 (3rd Cir., 1961).

V. The Unlawfulness of the Commission's Treatment of Passenger Deficits (Issues Nos. 14-19)

18. In stating such conclusions as it did on the general [fol. 1800] relativity of revenue needs in terms which eliminate needs represented by passenger deficits, the Commission violated the requirement of Section 15(6) of the Interstate Commerce Act which requires that the Commission consider the revenue needs of the carriers for all transportation services. 49 U.S.C. § 15(6). *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 360 (1936).

19. Section 15(6) of the Interstate Commerce Act requires that the Commission consider the fairness of the return on railway property. In dealing with revenue needs in terms of freight income without considering or finding the railway property held for and used in freight transportation service by the various groups of railroads, and without considering or finding the fairness of return on freight property represented by the freight earnings upon which it relied, the Commission violated Section 15(6), as well as the requirement of Section 8(b) of the Administrative Procedure Act that it make findings upon all "material issues." 49 U.S.C. § 15(6); 5 U.S.C. § 1007(b).

20. The Commission's reliance upon freight net railway operating income, which eliminates carrier revenue requirements represented by passenger deficits, raised "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act. In failing to state findings and conclusions, as well as the reasons or basis therefor, with respect to this reliance upon freight income, the Commission failed, even on its own theory, to state the "reasons or basis" for findings and conclusions upon "material issues" in violation of § 8(b) of the Administrative Procedure Act. 5 U.S.C. § 1007(b).

[fol. 1801] 21. The Commission's elimination of passenger deficits in dealing with relative revenue needs was arbitrary and was unsupported by substantial evidence within the meaning of § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), where:

(a) There was no evidence as to the amount of expenses solely related to passenger service or the proportion of common expenses allocated to passenger service that could be avoided by discontinuance of passenger service.

(b) There was no evidence that any passenger train operated by the Mountain-Pacific railroads fails to

realize revenues at least equal to the expenses which could actually be saved by their discontinuance.

(c) There was no evidence by which the lawfulness of discontinuing any passenger train could be determined, from the standpoint either of the public or of the railroads.

(d) There was no evidence indicating the extent to which any railroad or group of railroads could have reduced their passenger deficits in the years in question.

(e) There was no evidence that the greater increases in the Mountain-Pacific railroads' passenger deficits were the result of their inefficiency, or that they should have discontinued more of their passenger service, or that any other basis existed for the Commission's refusal to recognize revenue requirements represented by passenger deficits.

22. The Commission unlawfully denied the Mountain-[fol. 1802] Pacific railroads and Mountain-Pacific state commissions a full and fair hearing where:

(a) The concept that the Commission could eliminate revenue requirements represented by passenger deficits was not asserted by any party, and the concept was injected in the case for the first time by the Commission's Examiners in their Recommended Report.

(b) There was no evidence which would make possible an evaluation of the factual assumptions underlying the Commission's reliance upon passenger deficits.

(c) The Commission refused to afford said railroads and state commissions an opportunity to prove that the passenger deficits of the Mountain-Pacific

railroads were not unduly high, that there was no disproportionate potential for savings in their passenger operations, and that the public interest must be considered with respect to curtailment of passenger service.

Said error of the Commission was not waived where the Mountain-Pacific railroads and state commissions raised the claim at the earliest opportunity in their Exceptions before the Commission and maintained their claim in their petitions for reconsideration. The fact that they did not also file a formal petition for further hearing is irrelevant, particularly where the Commission itself did not rely upon any such ground as a basis for denying relief. 49 U.S.C. § 15(6). *Interstate Commerce Commission* v. *New York, New Haven and H.R. Co.*, 372 U.S. 744, 763-764 (1963); *Securities & Exchange Commission* v. *Chenery Corp.*, 332 [fol. 1803] U.S. 194, 196 (1947).

23. The claim of plaintiffs and intervening plaintiffs that differences in requirements for investment funds for equipment and facilities commensurate with industrial development in the territories served by the respective carriers should be considered in determining revenue needs raised a "material issue" within the meaning of § 8(b) of the Administrative Procedure Act. In failing to state the reasons or basis for its refusal to recognize such differences, the Commission violated Section 8(b). 5 U.S.C. § 1007(b).

VI. The Unlawfulness of the Commission's Treatment of Cost of Service (Issues Nos. 20-29)

24. The Commission's use of aggregate costs of railroad groups in comparison with aggregate revenues by railroad groups as the basis for its determination of cost of service raised a "material issue" within the meaning of Section 8(b) of the Administrative Procedure Act. In fail-

ing to state any reasons or basis for its use of aggregate costs, the Commission violated Section 8(b). 5 U.S.C. § 1007(b).

25. Data showing the empty return ratios of railroads in their handling of transcontinental freight traffic were relevant to a material issue raised in the proceedings before the Commission. When the Mountain-Pacific railroads came forward with such data for Mountain-Pacific territory, the Eastern and Midwestern railroads were un- [fol. 1804] der obligation to come forward with comparable evidence with respect to their operations under the principle that requires the party in possession of cost data needed for the resolution of a material issue in the proceedings to come forward with that data. In light of the Commission's finding that the Eastern and Midwestern railroads did not come forward with comparable evidence, those railroads failed to fulfill that obligation. *Interstate Commerce Commission* v. *New York, New Haven & H.R. Co.*, 372 U.S. 744, 760 (1963); *Boston and Maine R. Co.* v. *United States*, 208 F.Supp. 661, 675-676 (1962), *aff'd*, 371 U.S. 26 (1962).

26. The Commission has power under Section 20(1) of the Interstate Commerce Act to compel the production of cost data bearing upon material issues when said cost data are not voluntarily brought forward by the parties themselves. 49 U.S.C. § 20(1); *Boston and Maine Railroad* v. *United States*, 162 F.Supp. 289 (D. Mass. 1958), appeal dismissed, 358 U.S. 68, 71 (1958).

27. The Commission could not lawfully refuse to give effect to the evidence of empty return ratios brought forward by the Mountain-Pacific railroads because of the absence of comparable evidence with respect to the empty return ratios of the Eastern and Midwestern railroads where the latter evidence was in the sole possession of those railroads, where none of those railroads came for-

ward with the comparable evidence required, and where the Commission did not compel production of such evidence. *Boston and Maine Railroad* v. *United States,* 208 F.Supp. 661, 675 (D. Mass. 1962), *aff'd,* 371 U.S. 26 (1962).

28. The Commission's use of Rail Form A railroad [fol. 1805] group average box car empty return ratios for application to special purpose box cars, producing a higher figure for the East despite the uncontroverted evidence that the empty return ratios on "special purpose box cars" are the same for all groups, was arbitrary, and was not supported by substantial evidence, within the meaning of Section 10(e) of the Administrative Procedure Act. 5 U.S.C. § 1009(e).

29. The Commission's reliance in substantial part upon Rail Form A railroad group average maintenance of way and structures costs on the premise that transcontinental traffic moves over the various categories of lines of the Midwestern railroads in the same degree as the average of all traffic was arbitrary and was not supported by substantial evidence, within the meaning of Section 10(e) of the Administrative Procedure Act. 5 U.S.C. § 1009(e).

30. The Commission's substantial reliance upon erroneous measurements of the relative size of engine districts in the East and West was arbitrary and capricious, and is unsupported by substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act. The Commission's assumption that the relative size of engine districts is relevant in determining locomotive and car costs was also arbitrary and without the support of substantial evidence. 5 U.S.C. § 1009(e).

31. The Commission's use of Rail Form A railroad group average empty return ratios, for refrigerator cars in its determination of cost of service raised a "material [fol. 1806] issue" within the meaning of Section 8(b) of the Administrative Procedure Act. In reciting the contentions

of the parties on this issue, the Commission did not satisfy its obligation under Section 8(b) to state findings and conclusions, as well as the reasons or basis therefor, in support of its action on the issue. 5 U.S.C. § 1007(b). *Southern Railway Co.* v. *United States,* 167 F.Supp. 747, 754 (M.D. Ga. 1958).

32. The standard for measuring the cost element related to the property base of the carriers in a divisions proceeding was a "material issue" within the meaning of Section 8(b) of the Administrative Procedure Act. The Commission's failure to determine this standard, or to state findings and conclusions, as well as the reasons or basis therefor, to support its use of the "Elements of Value" formula under any rational standard violates Section 8(b). 5 U.S.C. § 1007(b).

33. The Commission's use of Rail Form A railroad group average costs and cost factors in its cost determination was not supported by findings and substantial evidence within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act, even assuming arguendo that the data in the Mountain-Pacific railroads' cost study were lawfully rejected. 5 U.S.C. §§ 1007(b), 1009(e).

34. Each of the errors made by the Commission in this case was prejudicial within the meaning of Section 10(e) of the Administrative Procedure Act and not *de minimis.* The Court cannot know how the Commission would have decided the case had these errors not been made. 5 U.S.C. [fol. 1807] § 1009(e); *Pacific Inland Tariff Bureau* v. *United States,* 134 F.Supp. 210, 213 (D. Ore. 1955).

35. Plaintiffs and intervening plaintiffs are entitled to a judgment which perpetually enjoins and permanently annuls, suspends and sets aside the Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order of the Commission dated June 20, 1963, and

the Order of the Commission dated December 31, 1963, all entered by the Commission in its Docket No. 31503 and Sub Nos.

Dated: ....., 1964.

.....
United States Circuit Judge

.....
United States District Judge

.....
United States District Judge

Respectfully submitted,

O'Melveny & Myers, Pierce Works, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles, California 90013;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago, Illinois 60603, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

[fol. 1808] Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.;

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

W. A. Thie, Barrett Building, Denison, Texas;

M. E. Clinton, 204 M-K-T Building, 701 Commerce Street, Dallas, Texas 75202;

John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff Missouri-Kansas-Texas Railroad Company;

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco, California, By Cyril M. Saroyan by DMW, Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California;

[fol. 1809] Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, 336 Hillcrest, Suite 519, Inglewood, California, By Joseph Besnah, Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.

[fol. 1810] Affidavit of Service (omitted in printing).

[fol. 1812]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JUDGMENT PROPOSED BY PLAINTIFFS AND INTERVENING PLAINTIFFS—Lodged November 2, 1964

The Court, having made its Findings of Fact and Conclusions of Law upon final hearing and determination of this action,

It Is Hereby Ordered:

That the enforcement, operation and execution of the Order of the Interstate Commerce Commission dated March [fol. 1813] 21, 1963, as amended by the Order of the Commission dated June 20, 1963, and the Order of the Commission dated December 31, 1963, all entered by the Commission in its Docket No. 31503 and Sub Nos., are hereby perpetually enjoined and permanently annulled, suspended and set aside.

[File endorsement omitted]

Dated: ....., 1964.

.....
United States Circuit Judge

.....
United States District Judge

.....
United States District Judge

Respectfully submitted,

O'Melveny & Myers, Pierce Works, Homer I. Mitchell, Warren M. Christopher, Donald W. Wessling, 433 South Spring Street, Los Angeles, California 90013;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago, Illinois 60603, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

[fol. 1814] Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.;

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014;

W. A. Thie, Barrett Building, Denison, Texas;

M. E. Clinton, 204 M-K-T Building, 701 Commerce Street, Dallas, Texas 75202;

John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff Missouri-Kansas-Texas Railroad Company;

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco, California, By Cyril M. Saroyan by DMW, Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California;

[fol. 1815] Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, 336 Hillcrest, Suite 519, Inglewood, California, By Joseph Besnah, Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.

[fol. 1816] Affidavit of Service (omitted in printing).

[fol. 1818]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

The Honorable Stanley N. Barnes, Judge, U.S. Court of Appeals; The Honorable William C. Mathes, Judge, U.S. District Court; The Honorable E. Avery Crary, Judge, U.S. District Court.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, LOS ANGELES JUNCTION RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SANTA MARIA VALLEY RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TRONA RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, VENTURA COUNTY RAILWAY COMPANY, and THE WESTERN PACIFIC RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

Reporter's Transcript of Proceedings—
Thursday, November 19, 1964

Place: Los Angeles, California

[File endorsement omitted]

[fol. 1819]
Appearances:

For the Plaintiffs
The Atchison, Topeka and Santa Fe Railway Company, et al.:

O'Melveny & Myers Pierce Works, Homer I. Mitchell, 433 South Spring Street, Los Angeles 13, California;

and

Intervening plaintiffs
Amador Central Railroad Company, et al.:
Sidley, Austin, Burgess & Smith, Howard J. Trienens, Douglas F. Smith, George L. Saunders, Jr., 11 South La Salle Street, Chicago 3, Illinois;

For the Intervening Plaintiffs
St. Louis-San Francisco Railway Co. and Missouri-Kansas-Texas Railroad Co.:
Gibson, Dunn & Crutcher, Dean Dunlavey, 634 South Spring Street, Los Angeles 14, California;
John E. McCullough, 300 Frisco Street, St. Louis 1, Missouri;

For the Intervening Plaintiffs
The People of the State of California and the Public Utilities Commission of California:
Cyril M. Saroyan, 5072 State Building, San Francisco 2, California;

For the Intervening Plaintiffs
Public Utilities Service Commission of Oregon, et al.:
John F. Weisser, Assistant Attorney General of the State of Oregon, 103 Public Service Building, Salem, Oregon;

For the Defendant
United States of America:
Manuel L. Real, United States Attorney, by James R. Dooley, Assistant United States Attorney, 600 Federal Building, Los Angeles 12, California;

For the Defendants
United States of America and Interstate Commerce Commission:
Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C.;

[fol. 1820]
For the Intervening Defendants
The Baltimore and Ohio Railroad Co., et al.:
Thelan, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California;
Joseph F. Eshelman, Edward A. Kaier, 1600 Three Penn Center Plaza, Philadelphia 2, Pennsylvania;
Kenneth H. Lundmark, 466 Lexington Avenue, New York 17, New York;

For the Intervening Defendants
Chicago and North Western Railway Co., et al.:
Newlin, Tackabury & Johnston, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California;
Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, 1 North La Salle Street, Chicago 2, Illinois;
Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

For the Intervening Defendant
Chicago, Milwaukee, St. Paul and Pacific Railroad Company:
Raymond K. Merrill, 888 Union Station, 516 West Jackson Boulevard, Chicago 6, Illinois.

Reported by: Virginia K. Wright and Kay J. Wight.

[fol. 1822]
Los Angeles, California, Thursday, November 19, 1964.
10:05 A.M.

The Clerk: 63-745, The Atchison, Topeka and Santa Fe Railway Co. v. United States of America and Interstate Commerce Commission, for oral argument.

Mr. Dooley: Your Honor, I would like to make an ex parte motion.

Judge Barnes: For someone's admission?

Mr. Dooley: Yes.

I would like to move the admission of Mr. Arthur J. Cerra to practice before this court for the purposes of this case only.

Mr. Cerra is a member of the Bar of the District of Columbia. He has been admitted to practice before the Supreme Court of the United States and he is an assistant general counsel for the Interstate Commerce Commission. I vouch for his good moral character.

Judges Barnes: All right.

Any other motions?

Mr. Baldwin: Yes, your Honor.

My name is James W. Baldwin. I would like to introduce Mr. Edward A. Kaier of Philadelphia. He is a member of the Bar of the Supreme Court of Philadelphia, the District Court for the Eastern District of Pennsylvania and the Supreme Court of the United States.

[fol. 1823] I would like to move his admission for the purposes of this case.

Judge Barnes: Any other motions of that type?

(No response.)

Judge Barnes: Mr. Clerk, do you have the oath you can administer?

The Clerk: No, your Honor, I don't.

Judge Barnes: Raise your right hand.

(Mr. Cerra and Mr. Kaier comply.)

Judge Barnes: Do you solemnly swear you will conduct yourself as an attorney at law in accordance with the rules of this court, so help you God?

Mr. Kaier: I will.

Mr. Cerra: I will.

Judge Barnes: Gentlemen, you are admitted for the purposes of this case. We are always happy to have Phila-

delphia lawyers, but not so happy the District of Columbia because they won't admit us when we go back there.

(Laughter.)

Mr. Cerra: Not even on motion for the purpose of a single case?

Judge Barnes: Maybe presently they will do that.

(Laughter.)

Judge Barnes: Don't take me too seriously. I think you know what I mean.

[fol. 1824] Mr. Cerra: I was worried.

Mr. Dooley: Your Honor, Mr. Cerra is representing the Interstate Commerce Commission. However, for the purposes of the hearing today he is going to represent both the United States of America and the Interstate Commerce Commission, and I would like to ask permission of the court to be excused from further participating in these proceedings, since Mr. Cerra will represent the United States of America.

Judge Barnes: All right, Mr. Dooley.

Mr. Dooley: Thank you, your Honor.

Judge Barnes: I take it you gentlemen have agreed between yourselves as to how much time is required?

Mr. Trienens: Yes, your Honor. Plaintiffs and intervening plaintiffs, on behalf of four counsel, have requested three hours, and I understand a similar allocation will be requested by counsel for the defendants and intervening defendants.

Mr. Cerra: Please the court, on behalf of all defendants and intervening defendants in the case we would request for the entire argument in the case three and a half hours.

Judge Barnes: I understood it was to be three and a half hours for each side.

Mr. Trienens: Yes.

Judge Barnes: Is that correct?

[fol. 1825] Mr. Trienens: Yes, sir.

Judge Barnes: All right.

Now, who is going to lead off for the plaintiffs?

Mr. Trienens: I shall, sir.

The Court: All right.

[fol. 1826] Mr. Trienens: I am Howard Trienens representing the plaintiffs and the intervening plaintiffs Amador Central Railroad, et al.

I will be followed by Mr. McCullough representing the Katy and Frisco Railroads, Mr. Weisser representing the intervening State Commission, and Mr. Cerra representing the intervening State of California.

Judge Barnes: Now how much time do you desire of the three and a half? We are going to hold you to this schedule.

Mr. Trienens: Two hours, sir.

Judge Barnes: Two hours?

Mr. Trienens: To open, yes, sir.

Judge Barnes: Does that include only your argument?

Mr. Trienens: That's right, sir.

Judge Barnes: And these other gentlemen are going to come within the—

Mr. Trienens: That is correct.

Judge Barnes: All right.

Judge Mathes suggests that you are not required to use it all.

(Laughter in the courtroom.)

Judge Barnes: But you have quite a bit to cover. Go ahead.

Mr. Trienens: On March 20th the court entered a pro-
[fol. 1827] cedural order which provided in part as follows:

On the hearing date plaintiffs and intervening plaintiffs will offer, and the court will receive in evidence, a certified copy of the proceedings for the Interstate Commerce Commission. No further evidence will be offered and the court will hear oral arguments.

Accordingly I offer at this time as Plaintiffs' and Intervening Plaintiffs' Exhibit No. 1 a certified copy of the entire proceedings before the Interstate Commerce Commis-

sion, this copy having been previously lodged with this court, the clerk of this court.

Mr. Cerra: Defendants and intervening defendants have no objection.

Judge Barnes: I understand it is in the clerk's office.

Mr. Trienens: Yes, sir. It is lodged in what he calls the exhibit room.

Judge Barnes: And occupies a good bit of it, so I am advised. All right.

Opening Argument on Behalf of Plaintiffs and Certain Intervening Plaintiffs

Mr. Trienens: If the court pleases, this is an action to set aside and enjoin orders of the Interstate Commerce Commission which will prescribe new divisions of transcontinental freight rates. Plaintiffs, the railroads, are in the western territory, Mountain Pacific territory, in the [fol. 1828] eleven western states. Plaintiffs originate or terminate the transcontinental freight traffic which is covered by the Commission's orders.

Judge Barnes: I don't know if it will be of aid to you or not, I don't know and I don't want to tell you how to argue your case. But you can assume that each one of the judges has read the briefs. And so we are somewhat familiar with the problems.

Mr. Trienens: Yes, sir.

Judge Barnes: As familiar as judges can be by such a reading.

Mr. Trienens: Yes, sir.

The eastern railroads, to identify the nomenclature I use, will be the railroads that originate or terminate the traffic in the East. And by "eastern," we mean east of St. Louis.

And the midwestern railroads are participants as intermediate carriers in that transcontinental traffic to and from the East. And they also originate traffic to and from the West.

Now, the orders of the Commission before this court prescribe an entirely new division effective July 1, 1963. And for the East these are a series of particular percentages that all increase the divisions of the eastern lines. [fol. 1829] For the midwest there are some scales, which I will get to in a moment, but they generally increase the divisions of the midwestern lines.

Now, the combined brunt of these two increases fall upon the Mountain Pacific railroads. These railroads are also called from time to time Transcontinental Roads. And the reason for that is that these railroads were built, and their existence depends upon their handling of this transcontinental traffic which is an issue in this case. The transcontinental traffic is a half of our business. It is a relatively small part of the midwestern business, about 15 per cent, and a very small part of the eastern business, about 6 per cent.

Judge Barnes: Let me ask you a question, have the plaintiffs attempted to set out for their own edification the effect of these percentages?

Mr. Trienens: For our own internal information, and to the extent we have to estimate it for Commission reports, we have undertaken to try to do that. It is not an easy job.

Judge Barnes: Well, I understand that. There is also a dispute as to how you can figure it.

Mr. Trienens: That's right.

Judge Barnes: Which is fundamental.

Mr. Trienens: That's right, sir.

[fol. 1830] Judge Barnes: But I was wondering if there wasn't some compendium of such information as to what to give concretely what the effect would be.

Mr. Trienens: Well, the estimates that we have made and have published with the qualifications that I have mentioned, indicate that for the seven principal roads it is around forty or forty-five million dollars a year.

Judge Crary: Talking about Western Roads?

Mr. Trienens: Not the Western Roads, the seven major plaintiff roads. In other words, by western, you mean far western roads?

Judge Crary: Yes.

Mr. Trienens: I am talking about the principal far western roads.

Judge Crary: Yes. And you say it is what per cent?

Mr. Trienens: I say it is about forty to forty-five million dollars annually, the best we can calculate.

Judge Crary: And that is calculated under your method, of course, of determining these various revenue needs and so forth.

Mr. Trienens: Oh, no, no. I am talking now about the revenue, the effect of the order.

Judge Crary: All right.

Mr. Trienens: What the order would do to us.

[fol. 1831] Judge Crary: Yes. And that is determined on your computation—you are taking your net profit and taking, of those net profits, the percentage of the divisions that you are entitled to? Is that all you have done?

Mr. Trienens: We take the revenues that these shipments produce.

Judge Crary: Yes.

Mr. Trienens: We have done our best to apply these divisions as prescribed, and the difference between what we would get on the present division and what we would get under the new divisions on an annual basis.

Judge Crary: Yes. That isn't complicated so far, is it?

Mr. Trienens: Well—

Judge Crary: It is just taking the percentage of a figure of a net return, isn't it?

Mr. Trienens: Well, it is complicated because they prescribe a whole new structure, and it is hard to tell just how this will apply. We can estimate it on assumptions that the traffic will remain static, and do it mechanically, as you suggest. And that isn't hard. But there is a lot of assumptions, a lot of ambiguities—

Judge Crary: Your net revenue is an assumption, isn't it? You have taken the net revenue for some period of time and applied these new divisions to it and that isn't [fol. 1832] complicated.

Mr. Trienens: That's right.

Judge Crary: But when you get into the revenue needs, then you do get into complications.

Mr. Trienens: It is complicated in the first step, your Honor. We know our net revenues for any given period. We know our gross revenues. We know—this applies to gross revenue. We know those.

We then take these newly prescribed divisions and we undertake to see what they would do to our revenue. And this order is not simple to apply. These scales are not easy to apply, you don't know how, quite what effect it will have on the traffic. But making the best of something we have to assume—

Judge Barnes: You have to assume you will get the same traffic.

Mr. Trienens: That's right, over the same route.

Judge Barnes: That may be a bad assumption, but for this purpose you have to assume it.

Mr. Trienens: Yes, sir. But on that static assumption, which is probably unrealistic, we then calculate it on the new divisions and we get a difference of about forty-five million dollars annually.

Judge Mathes: Which you say would be taken away from the Western Roads and given to the Eastern Roads? [fol. 1833] Mr. Trienens: It would diminish our revenues in that amount and it would be spread over all the Eastern and Midwestern Roads, however it falls.

Judge Barnes: The percentage of your gross, what is that?

Mr. Trienens: I don't have that figure in mind.

Judge Crary: Do you know what it is of your net? What percentage it would be of your net, this forty to forty-five million?

Mr. Trienens: No, I don't, sir. I don't have it in mind. The reason I don't—and I don't want to withhold from this court any information—but the record in this case just doesn't have that information.

Judge Crary: No, it isn't in the record, I know there is no figures of that kind.

Mr. Trienens: No, I have not.

Judge Barnes: That is why we asked you, we have been discussing it and we wanted to know if there was any such memorandum that you had used for your own purposes which might give us some more information.

Mr. Trienens: Well, we filed these net changes with the Commission. But I haven't assembled them in that form.

Judge Crary: Was that filed with the Commission before their last hearing?

[fol. 1834] Mr. Trienens: No, no, sir. This was filed after their report.

Judge Crary: After the report.

Mr. Trienens: And it has never been put in the record.

Judge Crary: It is not in the record, even in the admissions.

Mr. Trienens: No, sir.

Judge Crary: All right.

Mr. Trienens: Now, the basic difficulty we have with this record is that there just isn't any way of telling from the reports of the Commission or the record the amounts of revenue that are affected, what the revenue requirements of the Mountain-Pacific lines are, what are the fair returns for the Mountain-Pacific Roads would be, there is no way to tell what the bases for these new per cents of scale is. This is an order that changes revenues in an unstated amount to meet unstated needs without the changes being known to the court or to the parties.

Now we don't think this type of administrative action is consistent with the law. We think a judicial review is designed to protect against this very sort of arbitrary action.

Now, I intend to argue this case in the order of the issues which were filed with the court on October 22nd.

[fol. 1835] There are a number of specific legal issues, there are thirty of them. But actually there are not thirty separate concepts, there are not thirty different ideas. Most of them arise from a single source, a violation of the Administrative Procedure Act. And most of the remaining issues arise from the Commission's use of a rather novel, and we think an unlawful standard, of dealing with revenue needs. And I want to deal with them in order, but somewhat grouped.

Now, issues No. 1 to 4 deal with the lack of findings or consideration of the revenues required by the carriers in the light of the divisions being prescribed. Two statutes are relevant to this claim. The first is Section 15(6) of the Interstate Commerce Act which deals with the prescription of divisions.

And that provides that in prescribing just, reasonable and equitable divisions the Commission shall give due consideration to specified items. And one of these is the amount of revenue required to pay the carrier's respective operating expenses and a fair return on their railroad property held for and used in the service of transportation.

Judge Crary: In your computation do you have a figure as to what you contend your revenue needs are, under the method, of course, under which you have computed?

You have given us the difference now that you say the [fol. 1836] divisions would affect. Now what do you say your revenue needs are?

Mr. Trienens: Now, that we did argue on on the record, it does show on the record. I don't have the figure in mind. But what we did was this.

We showed, and it is in Exhibit T-275, which is in this printed abstract of the record, we undertook to show exactly what we had spent, the expenses, we undertook to show what our depreciation accruals were, we undertook to show the amount we required to serve the territory, we undertook to show what property we had devoted to the transportation service. And we showed what return that produced.

And we argued that it was inadequate, that it was an unfair return. We showed it for the other railroads, and we showed that on the basis that we contended for, which did reflect the needs to serve the territory and the need to buy these cars, and that our stockholders were recovering less than the other territories.

Judge Crary: Did you figure it in dollars and cents? You are asking in dollars and cents now, did you make an estimate of it on your own method of computation in dollars and cents, of what you contended your revenue needs are?

Mr. Trienens: We showed in dollars and cents what we [fol. 1837] thought we needed to show that our territories were serviced.

Judge Crary: You don't have that?

Mr. Trienens: It is in Exhibit T-275.

Judge Crary: All right, all right.

Mr. Trienens: Now, I might pause there to note that we are not contending that this court must find as a matter of statutory law that the Commission has to find these revenue needs, these revenue requirements in a particular way. We say, well, we did it in dollar amounts. We say the dollar amount would have been the natural way to do it, we don't say it has to be done this way, it has to be done the other way—

Judge Crary: No, but you are saying that they have to arrive at a dollar amount regardless of the method, isn't that what you are saying?

Mr. Trienens: Well, they have to say it in some rational form. Now, I don't know what you could do besides dollar—

Judge Crary: That is the point, the one point you are making here. You say it has to be—you say it is the failure to find that is unlawful. Now, the Commission's unlawfulness is the failure to find and consider the amount of revenue required.

Mr. Trienens: That's right.

[fol. 1838] Judge Crary: Isn't that what we are talking about?

Mr. Trienens: That's right, sir.

Judge Crary: In dollars and cents.

Mr. Trienens: In either dollars and cents or any other rational form.

Judge Crary: All right.

Mr. Trienens: That's right.

Judge Crary: All right.

Mr. Trienens: We think the finding of the amount of revenue required in dollars and cents, or some other form which they may choose, is a material issue in the case. We also think that the—

Judge Barnes: Give me an example of other forms.

Mr. Trienens: They might want to do it in terms of dollars of fixed value, or in terms of—not present dollars but dollars, say, when the plant was originally acquired, dollars of constant value. They might want to do it in—

Judge Barnes: They might want to get some dollar figure.

Mr. Trienens: They might do it in some form of quantity. I don't know, I can't think of any other way.

Judge Barnes: The way the statute says, amount of revenue required. It is pretty hard to get away from dol-

[fol. 1839] lars and cents.

Mr. Trienens: You would think so, wouldn't you. I would think so. That would be the natural way I would do it if I were doing it.

Now, we also say that an essential element of this process in figuring the just, reasonable and equitable divisions for the future is that you have to know and consider at the same time the revenue or financial effect of those new divisions.

[fol. 1840] How else can you tell whether the new divisions being prescribed are just, reasonable and equitable, in light of the amount of revenue required, which is the standard of the Act, unless you know and find the amount of revenues which will be changed by these new divisions and whether the carrier will be able to satisfy those revenue needs? It is an essential element of this, justice, reason-

ableness and equity, of these new divisions. The materiality of those factors can hardly be denied in this case, but the Commission went out of its way to reject cost as the basis of these divisions. They said they were designed to reflect the broader aspects of revenue needs, so they tied it to this whole revenue picture that they said their divisions were designed to reflect, so they can hardly now say that this wasn't a material issue. Indeed, materiality is mandatory under the statute.

The question, I think, that is before the court is what is the statutory duty in dealing with these material issues. Now, the Administrative Procedures Act makes it perfectly clear that the Commission shall state the findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact, law or discretion presented on the record.

The fact that it is a matter of discretion doesn't relieve them of that finding of it. Our claim is that 8(B) of the [fol. 1841] Administrative Procedures Act has been violated because the amounts of revenue required by the carriers, the financial effect of the divisions being prescribed are material issues, because no findings were made.

Now, the defendants, as you will note from the list, state the issues differently. They state the issues as to whether Section 8(B) requires the Commission to do anything beyond what they did. You can't tell from the defendants' statement of issues whether they are saying these matters are not material issues as to which no findings are required, or whether findings were in fact made. You just can't tell. And they won't say, they can't point to findings showing where they were made.

But the defendants do ask the court in rather voluminous findings of proposed—proposed findings of fact and conclusions of law they do ask the court to make 13 pages of findings about these issues—pages 17 to 30 of the document—in which they recite almost everything the Commission said about the subject of revenue needs, but when

you search through this maze and you try to identify just where they found the amount of revenue required by any railroad or group of railroads or the financial effect of prescribed divisions, the finding just isn't there.

The Commission itself didn't claim it made findings. The Commission's supplemental report states that its authority [fol. 1842] under Section 15(6), which requires due consideration of revenue needs, is not limited in concept or scope.

The Commission goes on:

"There is no rule, statutory or otherwise, requiring that we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared with unlawful divisions."

Now, the rule we say requires it is the statutory rule of Section 8(B) of the Administrative Procedures Act.

The Commission didn't find these amounts, they didn't find the effect in any form.

Judge Barnes: Is the Commission emphasizing the words "lawful" and "unlawful" there?

Mr. Trienens: Apparently, apparently. It is completely circular so far as I am concerned, because the statute says to determine whether they are lawful you have to consider them in light of the amount of revenue required.

I don't know how you can find they are lawful without knowing those things. I don't follow that sentence at all.

What the Commission has really held and what they found is simply that the Eastern lines be given more revenues; that is what they found.

They ask this court to conclude—and these are their [fol. 1843] words—they ask this court to conclude:

"It is enough—it is enough that the Commission find that the Eastern lines need more money."

That is their proposed conclusion of law. This proposed conclusion they ask the court to make is in direct conflict with the decision of the Colorado court, Colorado three-

judge court, in Atchison, Topeka and Santa Fe v. United States, 225 Fed. Supp. 584. That is what I shall refer to as a companion case to this one, because the Commission made the same kind of statement on the same kind of evidence in a divisions case between substantially these same railroads.

The court held explicitly that such a generalized finding of revenue needs, the Eastern lines need some more money, without a finding of the financial effect on the railroads primarily affected, was not enough to satisfy the Commission's duties under Section 15(6) and 8(B).

Now, counsel for the Commission in their—would try to avoid this whole findings problem by saying there is a big difference between what the Commission must hear and consider and what it must specifically find in its report.

We don't think that is any answer to Section 8(B) of the Administrative Procedures Act, which says you have got to find these things. Besides, how can this court know if the Commission considered the material issues if the [fol. 1844] Commission doesn't find it?

Furthermore, in this case there wasn't any evidence from which they could make this calculation.

We realize, we recognize that if the Commission undertook to have a new structure of divisions that the parties hadn't contemplated, that the evidence in the record was not adequate to enable the calculations to be made, we offered at one of the hearings the underlying traffic data from which any calculations of any division could be made, no matter whether the parties had foreseen it or not. This evidence was rejected. They wouldn't let us identify it and they rejected all of our exceptions to these refusals.

Having kept out the evidence necessary to calculate these matters, I don't think it is proper to say now that the Commission considered it when they didn't have the evidence from which the consideration could be made. And this failure of consideration, as well as the failure to find, is a plain violation, we believe, of both Section 15(6) of

the Interstate Commerce Act and Section 8(B) of the Administrative Procedures Act.

Judge Mathes: Are there enough figures in the record to enable someone to make these computations and arrive at some results?

Mr. Trienens: The record as it stands now?

Judge Mathes: Yes.

[fol. 1845] Mr. Trienens: No, sir, because the divisions which the Commission prescribed in its order are not in a form that any of the parties had contemplated when they put in these exhibits.

You could have if you had the underlying traffic data we offered. But you can't with the summaries that are now in the record.

Judge Mathes: You say it can't be done by mathematical computation?

Mr. Trienens: Not from this record, no, sir.

Judge Mathes: Arrive at it even roughly?

Mr. Trienens: No, sir, because of the radical difference of this structure. It could be done if you had the details for the shipments, but they aren't in the record. We offered them, but they aren't in the record. They weren't even identified.

Now, our Issue 5 covers the same ground of financial effect and amount of revenue required, but with the additional feature that we say that the Commission's duty extends also to consideration with respect to individual railroads.

Defendants claim that the Commission can deal with divisions solely in terms of groups, but Section 15(6) speaks of the carriers, the several carriers. The Commission cannot perform its duty, we do not believe, in disregard of [fol. 1846] the effect of its action upon individual carriers.

I want to make it plain this isn't a question whether individual carriers came in and made a poverty case for themselves, a special case showing they were different from anybody in the territory. This isn't a situation where the

Commission came along and dealt with everybody the same way, there would be a five per cent increase here or a ten per cent reduction there. They didn't do that, they didn't deal with everybody the same way. They came in with a brand-new radically different structure of divisions. These random and unrelated changes would affect different railroads in different ways, even though they may be in the same territory.

When the Commission swings a sword like this in a dark room without knowing what its effect is on any railroad inevitably someone will be hurt disproportionately.

Judge Crary: That is the Colorado case, isn't it?

Mr. Trienens: That is right, that is specifically what the court—

Judge Crary: Typical evidence, they can't take the aggregate. They can consider the aggregate and it is proper to consider the aggregate, but that is only one of the elements.

Mr. Trienens: That is true. There are two phases of the Colorado case, one of which is that the evidence has [fol. 1847] to be on a basis that shows what is happening to particular shipments and particular carriers. That is an evidence point.

Part B of the opinion goes to the Administrative Procedure Act and the findings and consideration, and there they hold again specifically that the Commission should find what the effect of its action was on the particular carriers primarily affected, and they commented that it was reasonable to require the Commission not only to show as to the Western Roads, but as to the individual Eastern Roads, because they profit disproportionately under this new structure. The rich roads of Detroit are favored by greater increases than the roads serving the West. There is no finding on that in this case.

Judge Mathes: Would it be your position the Commission isn't entitled to group the roads at all?

Mr. Trienens: Oh, no. I say they can group the roads.

Judge Mathes: You used the term "primarily".

Mr. Trienens: I think when it does group the roads and when it does prescribe a new basis of divisions that it must know and find what it does to particular railroads that happen to get hurt disproportionately.

Now, one example we use is the Denver & Rio Grande. It is in the Mountain Territory. Because of its situation [fol. 1848] and because of the way the issues were framed before the Commission it got hurt disproportionately by this new structure, this brand-new structure.

The Commission didn't find the amount of revenues required by the Rio Grande, they didn't find what it would do to the Rio Grande. We were able to estimate it and the estimate is also in our petition for reconsideration in this printed record. We were able to estimate that this new structure would cost the Rio Grande substantially all its net income. The Commission said, "Well, the Rio Grande had pointed out before the Commission the issues didn't include some divisions west of Ogden." That has nothing to do with our point.

Our point is the issues are what they were, the Commission prescribed these brand-new divisional structures the way they did and they had hit disproportionately certain railroads. The statute says they must consider the revenue needs of particular carriers, the several carriers, and here was a railroad that would be murdered by this if it went into effect.

Judge Barnes: You don't say they can't murder them, but they have to do it knowingly.

Mr. Trienens: I think if they had found and if they had shown exactly what their order was doing that they wouldn't have done it. I think the findings requirement is [fol. 1849] not a technical requirement. I think that if you lay out the facts and figures in front of you you don't do things that you might otherwise have done.

Judge Crary: You mean it wouldn't be fair, under your

theory, if they had done this, why, the figures would have shown it wasn't fair and just?

Mr. Trienens: Yes. And I am not asking this court to comment upon the fairness of it at all. I am saying that—I believe if the Commission had laid those figures out in front of it and made the proper finding it would have been so repelled by them that it wouldn't have done it. Its own sense of fairness would have not produced this if they had made the findings we think are legally required.

I am not asking this court to comment upon, pass upon the fairness as to what they did. That is for the Commission. But it is for this court to require that they made the minimal findings.

Judge Crary: You are saying before the Commission can determine what is fair and just they have to have this information before them, the financial effect and so forth?

Mr. Trienens: That is right.

Judge Crary: In a nutshell isn't that your position?

Mr. Trienens: Yes, sir. And that when they do put in [fol. 1850] a new structure like this they have to know what it does to individual railroads.

Judge Mathes: Isn't the remedy of the individual railroads to come in later and show its individual financial problems to the Commission and the Commission might increase the rates or offer some other relief to that railroad?

Mr. Trienens: I don't know how long the Rio Grande can survive under this. I know there is a limit—

Judges Mathes: Maybe it can't at all.

Mr. Trienens: That is right.

Judge Mathes: Isn't that to be decided upon in an aggregate determination, such as is made here? Isn't the Commission, in effect, saying, "Well, we will just shift this division of rates and reallocate and if individual railroads are hurt they can come in and make some showing"? Perhaps they can get some relief some other way.

Mr. Trienens: And some other day.

Judge Mathes: Yes.

Mr. Trienens: The difficulty here is that this order came out, these brand-new divisional structures came out in March of '63, which was the first time anybody ever saw them.

On its petition for reconsideration the Denver & Rio Grande not only asked for an extension of the effective date, which was not granted, and it was only the stay of [fol. 1851] this court which prevented them becoming effective, but they also asked that this special situation be considered because they can't make the division retroactive, they can't bail out the Rio Grande retroactively.

So they would just allow a period here without findings, without knowing what it did to the particular railroads. They would just say, "Well, maybe if they can survive bankruptcy until we can get around to this again, fine."

We think the findings are required under Section 15(6) and 8(B), the finding it is the amount of revenue required by the several carriers and the financial effect upon these several carriers. It is not a lawful order until that is done.

Judge Mathes: Is it your position that as to every individual railroad affected by this reallocation there must be findings and financial effect of reallocation upon that road?

Mr. Trienens: I don't think that we have ever suggested—I don't mean to suggest now that we want the Commission—we want this court to tie up the Commission so they have to make formalistic findings of each railroad, a hundred railroads in the East.

We do say that when they do come and make a brand-new structure and particular railroads are especially and [fol. 1852] disproportionately hurt, and do identify themselves—Rio Grande didn't make this a secret. They came right out as soon as they saw this order, and the Frisco and the Katy did the same thing.

We think under those circumstances the Commission cannot disregard and cannot refuse to make findings as to what

its new structure is doing as to those railroads that are particularly screaming about it.

Judge Mathes: My first question, isn't it open to the Katy and Frisco and D & RG to come in individually and ask for some relief now that this reallocation has been made?

Mr. Trienens: Their problem of surviving between July 1, '63—

Judge Mathes: Of course, the Commission may be slow and all that, but isn't the remedy open? That is my question.

Mr. Trienens: The remedy is open. I don't question that. What I say is the order is not lawful, to start with, if it doesn't have these basic findings.

Judge Mathes: As to every road?

Mr. Trienens: The findings have to be on material issues. I think the Commission can well say the roads that were operating in New England were dealt with the same way and we don't have to say what happened to the Bangor & [fol. 1853] Aroostock and the New Haven. But if they find they are all affected about the same way and find out how they are treated as a group, I wouldn't say they technically would have to make all these findings. They only have to make them on material issues, and we think this is highly material under this structure.

Judge Mathes: The average effect would take care of it.

Mr. Trienens: The average effect would take care of it if the Commission found as to any particular group that they were being treated pro rata and alike, but they didn't find that as to the roads in the West and they couldn't find it because their order didn't affect them that way.

Judge Crary: There were some 40 divisions?

Mr. Trienens: Excuse me?

Judge Crary: How many divisions were made, were there some 40?

Mr. Trienens: There were about 75 percentages in the East and scales that operate differently in the Midwest.

Judge Crary: The divisions made by the Commission didn't go as to each railroad, they didn't make a separate division as to each railroad?

Mr. Trienens: No, but they dealt with the New England group in one way and the Detroit group in another way. [fol. 1854] Judge Crary: You are not saying they have to make a special finding as to each railroad, but you are saying they have to make—this is a finding, in effect, as to each division, each new division, is that your position, or what is it?

Mr. Trienens: That is right. Our position just extended to this individual railroad situation. The Commission takes a situation and prescribed a division for the Detroit Railroads serving the East, four or whatever it is, and they find these railroads are all being treated equally. No one being treated disproportionately.

I don't think they have to then go further than that and find what happened to C & O and the Wabash.

When they come out West and if they find everybody serving the Pacific Coast is dealt with in the same way and they want to deal with that as a group and they find they are being dealt with proportionately as a group, that may be satisfactory, but it does become highly material when they set up a new structure, these new divisions that do single out different roads in different ways. This thing doesn't operate the same way all over the Mountain-Pacific Territory, it doesn't operate the same all over the East. Where it does operate disproportionately, that is a material question as to which they should make findings. [fol. 1855] Now, one thing I want to emphasize in dealing with these over-all effects of this order. It isn't as though the Commission had come along in this case and simply brushed aside these over-all financial implications, these over-all financial effects. It is a case in which they had made specific divisions that were not related to specific standards of the statute.

This raises a further error of the Commission, that it failed to do that, it failed to relate any of the percentages it prescribed to any of the standards of Section 15(6).

Now, as I say, there are 75 of these percentages prescribed for the East. So far as appears from the Commission's report these might have been drawn out of thin air.

Now, all these percentages hurt us, all these percentages hurt the Western lines, they are all increases that hurt the Western lines.

But the percentages that really killed us were the ones between Pittsburgh and Detroit, the Pittsburgh and Detroit groups and the Pacific Coast, Groups E-3 and E-4 and W-1. Those are the ones that really fixed us.

Now, we claimed before the Commission that those particular percentages, those highly material and important percentages between E-3 and E-4 and the Pacific Coast, [fol. 1856] taken by Chicago, were exorbitant under any conceivable basis, whether you think about distances, costs, revenues or anything, any standard of the Act.

Again, I want to make it clear I am not asking this court to pass upon the fairness, or even consider our argument about the fairness of these divisions. We do claim that the relationship between the particular divisions prescribed in the ultimate order of the Commission and the standards of Section 15(6) are material issues as to which the Commission is obliged to make specific findings under Section 8(B) of the Administrative Procedures.

Again, we are confident that they just would not have prescribed these percentages for E-3 and E-4 had they laid out specifically the findings that led them to the answer. I don't think there is any genuine issue as to whether the Commission did make findings supporting these particular percentages. I grant you there is about nine pages in these proposed findings that cite a lot of things the Commission says. But they only show that the Commission dealt with this as a whole, treated it as a whole. There is not a single finding relating any one of those particular percentages to any of the standards of the statute.

Now, one illustration of this is that at page 40—this is the Finding of Fact 38—the defendants refer to our contention about Pittsburgh and Detroit. They ask this court [fol. 1857] to find as a fact that we have specifically pointed this out. And then the finding would go on, in this connection the Commission found, and in these proposed findings there is a recital of a page or so of what the Commission said. But when you look through it there is not a word, not a word in there that relates at all to these Detroit-Pittsburgh group percentages. There just aren't any findings on it.

Now, the only thing that might be misleading about it that—and I want to make that clear—is in Finding of Fact 37(h) which appears at page 36 of this document—the defendants—quoting a statement of the Commission that related certain cost scales to Pittsburgh and Detroit, and I want to make it perfectly clear that when they did that they are talking about the City of Pittsburgh and the City of Detroit. There are a lot of Ohio cities this side of Pittsburgh, and there are a lot of cities this side of Detroit. But the Commission's findings were not related to the group—remember, we are talking about percentages for Groups E-3 and E-4. And it is perfectly apparent that there is no finding relating any of these percentages to any standard of the Act. These percentages are in a group.

Now we think that the relationship between those percentages and the statute is a material issue to which there should be findings. Indeed, this is the ultimate order of the Commission. This could not be more material.

[fol. 1858] Long ago, Justice Brandeis said in the Abilene case that the Commission's task isn't to deal with these things in the aggregate—this is a case that was cited in Colorado—it is not the Commission's job to just deal with these things wholesale in the aggregate. It is their job to make just divisions with respect to each joint rate. Indeed, in some of these percentages there isn't even any evidence as to what the present division is.

Now, I think that one of the most illustrative features of these conclusions that defendants have asked you to make—asked this court to make—it shows just how far they have to go to hold this order is the Conclusion of Law No. 15, which appears at page 111 of this document. It is a most remarkable conclusion. I think it is important because it illustrates just exactly how far this court would have to go to uphold this order—about line 7 on page 111—this is the way the defendants would have this court dispose of this issue.

"Section 8(B) of the Administrative Procedure Act must be considered in relation to the statutory requirements of Section 15(6) of the Interstate Commerce Act. Section 15(6) cannot be read as establishing the principle that in the exercise of practical judgment the Commission must by precedent and otherwise set forth the particular rate given in the evidence, or relate any division prescribed to the [fol. 1859] standards specified in Section 15(6) of the Interstate Commerce Act."

They want this court to conclude the Commission doesn't have to relate any division it prescribes to any of the standards specified in the Interstate Commerce Act. That is a remarkable conclusion. It shows exactly how far they have to go to have this court hold this order.

It is squarely in conflict with the decision of the three-judge court in Colorado which said that the Commission must make findings relating to the divisions prescribed in 15(6). I think a short way of doing this would just be to ask this court to repeal the Administrative Procedure Act as it applies to divisions, that is just what this finding would do, what this conclusion would do.

Now, again, I don't want to be misunderstood as saying that we think the Commission has to make findings on each and every one of these percentages. The statute talks about material issues. There are four or five of these percentages that are terrifically important, highly material. If the Commission had found what it was doing as to those,

and related those to the standards of the Act and found that the others were less important, less material, we wouldn't have the case we have here.

The point here is that they didn't relate any division prescribed to any of the standards of the Act. And they want [fol. 1860] this court to conclude that they didn't have to bother.

Now,—

Judge Crary: Is it your position that they should make findings, make these findings that you are now requesting this financial effect? You say now you don't have to make them as to all.

Mr. Trienens: We say this goes broader than financial effect, your Honor. This goes broader than financial effect. They didn't relate these Pittsburgh, E-3, E-4 divisions to any of the standards. They didn't use costs or distances or efficiency or revenue or anything. And we are saying as to that that we did identify which percentages we thought were highly material. We identified the E-3 and the E-4 ones. Those are the ones that killed us. That is where the dough is. And that is the ones we identified as material. There wasn't any secret. We weren't—

Judge Crary: What I am trying to analyze is this, did the rules apply only to certain divisions that affect you materially, or do they apply to only 75, or do they apply to every division that the Interstate Commerce Commission makes?

Mr. Trienens: I think the rules apply to every division the Interstate Commerce makes. But, since the statute [fol. 1861] requiring findings deal with all material issues, I don't think this court has to say that they must make certain formalistic findings as to all 75, because if the Commission had found how particular important divisions related to the statute, and then had found also that the others are related to these key percentages, I think we would have some difficulty saying they hadn't made findings on material issues.

But when they won't do it on any of them, no matter how important, that is this case. That is this case. I am not trying to have this court, or ask this court to lay down ground rules to restrict the Commission in any future matter. I am just saying in this case they didn't do any of it.

Now, the same pitfall I am speaking of about relating the divisions prescribed to the ultimate order, to the standards of the statute applies also to these divisional scales. And again I want to say that we are not asking this court to get into the wisdom or construction of these scales. We do claim that these scales, which are the ultimate order of the Commission, have got to be related to the standards of the Act.

Now just for illustration, let's consider the scale for the Midwest which is described as column 1 of the ultimate order. Now what is it? Well, it is a string of numbers [fol. 1862] that allows twelve of these factors for every 50 miles of service. Every 50 miles you are going to get another twelve factors. That is what the scale does.

Then you get down to the bottom and it allows an additional bunch of factors, 53 in number, which are equivalent to 221 miles for the carrier who performs the origin or destination service.

Now what is that bonus? What is that 221 extra miles, what does that represent? I think that is for the Commission to say. Just what is it? We know that the more you put in there, the more it helps the short-haul carrier. But just what does it represent? What is the rational basis? How does it relate to any standards of the Act?

Now, these divisional scales are not new to the court. They have been before the courts two times in the last two years, in the Boston-Maine case, which is 208 Federal Supplement 661, the court upheld the scale because the terminal allowance was found by the Commission to reflect terminal costs. And the court said there is a rational basis. And the court also found that there was substantial evidence to support those terminal allowances, those high terminal costs in that record.

There is no such finding, no such evidence in this case. [fol. 1863] Earlier this year the Colorado three-judge court had a very similar scale before it. They held it was unlawfully prescribed. Why? Because the Commission hadn't found the terminal costs, it had made no findings relating to the construction of this scale to any of the standards of the Act. That is exactly this case.

The question in each instance is not whether you think the scale is good, bad or indifferent. It is whether the Commission has found a rational basis and a basis supported by the evidence.

Here they disclaim costs. They don't relate any feature of this scale, particularly the elements that are in the zero mileage block to any of the standards of the statute.

Now, we believe that this lack of findings is entirely plain when you analyze the Commission's report. We think if you look for the findings they just clearly aren't there.

But I think the most that can be said for these reports is that they are obscure. And in this kind of case in which the absence of reasoned findings is the issue, the obscurity and complexity is not the defense to this order.

Judge Cardozo stated in an opinion often cited that we must know what an opinion means before the duty becomes ours to say whether it is right or wrong.

[fol. 1864] Accordingly, if these Commission reports seem obscure, if you just can't tell whether there is some finding lurking in the background somewhere, that obscurity is the reason, not for upholding the order but for setting it aside.

The real vice in this style of writing that permits these orders is that they all leave a gap between the random fact citations and contentions of the parties citations. There is a gap then when you get to the ultimate conclusions. They just don't bridge that gap.

And Commissioner Freas, who dissented in this 6 to 4 decision of the Commission, he made that perfectly plain. He cited the 8(B) of the Administrative Procedure Act. He said here is a gap between the evidence and the ultimate findings which is not bridged. Commissioner Freas was

right about that. The majority report never discussed that. They don't even acknowledge its existence.

The defendants' answer to all of this is that the Commission is expert. The court should have faith in the discretion and judgment of the Commission. If the defendants say "discretion" in their brief once, they say it a thousand times. Every time we say an issue is material they say, "Discretion," don't burden the Commission with making findings on matters of discretion.

But Congress thought otherwise. The Commission had [fol. 1865] a full and fair hearing before Congress as to whether they should be subjected to this statute which requires findings on material issues of discretion. The statutory provisions and legislative history make it perfectly clear that Congress meant business. And they did it having had the Commission at the hearings, the Commissioners came over and opposed this statute. They opposed it with specific reference to divisions cases saying, oh, we think it is enough to find that these railroads need more money.

The Congressman said, "What is the formula, tell us the formula, how do you do that?" And they just never got an answer to that. And they made it expressly plain in the legislative history that they did not intend to exempt the Interstate Commerce Commission from the provisions of the Administrative Procedure Act.

Now, should the court take that legislation seriously? The Supreme Court has made it plain that it should. In an opinion by Mr. Justice White a few years ago in the Burlington Truck Lines case, the specific error was that the Commission had failed to articulate any rational connection between the facts found and the choice made. That was the specific ground on which the order was set aside.

Mr. Justice White said that expert discretion is the life blood of the administrative process, but unless we make [fol. 1866] the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

I think the tone of that opinion suggests that they feel it is to be taken seriously.

Now, the question then is could it possibly be applied in a railroad divisions case. That is unthinkable to our opponents. Well, that is what we litigated out in Colorado. The three-judge court said the Supreme Court has recently emphasized that Section 8(B) is intended to have teeth, citing the Burlington Truck Lines case.

"It is argued by defendants that a strict requirement of findings and reasons does not apply in the instant case, where the choice is among a variety of divisional scales. [fol. 1867] "We think that the requirement should not be relaxed here." It made that ruling, dealing with the specific kind of order, kind of report you have before the court.

Bearing in mind that that Colorado case was a controversy between most of these same roads, the same examiners were in charge of the case, the same commissioner signed the report. I notice the historical note that both that commissioner and the senior examiner have since left the Commission.

There is no reason to believe that the present Commission would not be willing and able to comply with the Administrative Procedures Act and the standard set forth by the Colorado court.

How can I say that? I say that because the Commission says it. When its order was set aside in the companion case the Commission did not appeal. The Commission didn't feel this hamstrung its administration of the statute. It voted not to appeal. It came out with an order that expressly announced it would retry that case, retry those issues in conformity with the opinion of the court.

In view of the close relationship of this Colorado decision we were most interested in finding out how defendants proposed this court would deal with that case. Did they ask you to distinguish it? Did they ask you to come out and say it was wrong and let the Supreme Court try to [fol. 1868] resolve the controversy? How did they want you to deal with it?

You look through 138 pages in vain to find out, and the way you are supposed to deal with it, apparently, is to pretend it never happened. It just didn't come about that way, it just didn't occur.

That is the same treatment they gave the Burlington Truck Lines case. This court is supposed to ignore it in its conclusions; it just didn't happen.

Now, those decisions did happen, those decisions faithfully enforced the statute as Congress intended.

On the basis of those statements in the statute the order of the Commission before this court is clearly unlawful.

Now, there are separate legal errors which I will not undertake to deal with in any way that goes through our full claims as set forth in the briefs, largely because in these proposed findings there isn't any real dispute when you analyze it. There isn't any real dispute as to our basic claims.

The question the defendants raise is really one of confession and avoidance. To confess there isn't any substantial evidence on this, that and the other, and they avoid it by asking this court to make findings saying it wasn't prejudicial.

[fol. 1869] I will concentrate largely on the proposed findings and comment on that. And I first would like to mention this 15 per cent minimum. This is the one percentage as to which the Commission made any pretense of having findings and the finding was that the 15 per cent minimum was justified by increasing terminal costs. Our claim is that wasn't supported by substantial evidence.

Now, in their proposed findings they ask this court to make, get some new costs, costs we have never seen in the brief, costs that are new to this proceeding. They are costs for the year 1939 through '57, and they show an increase in terminal costs since 1939.

Now, if the court would calculate, desires to calculate just what these mean in terms of the issue we are talking about, and take the latest year they show and calculate it, what is the percentage for 50 miles in the East and 2200

miles in the West, which are fair, and using these costs, which are not the costs the Commission found, but these are the costs the Eastern lines advocated and the Commission rejected. But using these what do you get? Calculate it out and you find the minimum percentage would be 7.4 per cent.

And they say, "Oh, well, this shows increases."

And you say, "All right."

Let's assume these increases since '39 are going on for-
[fol. 1870] ever. That is not an assumption the Commission articulated. But let's assume the court wants to engage in that assumption, it would be 63 years before this ever got up to 15 per cent.

Now, defendants really recognize, as I see it, that these costs they have asked the court to find don't really carry the day for them, because they want the court to say, "Oh, well, besides these costs there is a generally recognized condition."

I don't know what that means, but the net effect of all this is that the parties have not cited any evidence, substantial or otherwise, to support even half of this 15 per cent minimum.

They do ask you to cite a lot of cases—they ask you to find a lot of cases in which the Commission has prescribed 15 per cent minimum in other cases. But you will note that not a single one of those cases was a haul anywhere near 2,000 miles, none of them. There is not a single precedent cited by anybody, much less in these findings, to support a 15 per cent minimum in a transcontinental haul. There just isn't any substantial evidence.

Now, a similar brush-off to one of our issues is the next one, Issue 12. That is an issue which relates to a finding of the Commission that there was a decline in the proportion of overhead transcontinental traffic in the Midwestern
[fol. 1871] routes. In other words, their proportion of the traffic on which they are intermediate had declined over the years.

We claimed that that wasn't so, that the evidence showed it was just the other way around, and we say in this court there isn't any substantial evidence to support the Commission's finding.

Do defendants include in the findings of fact—did they ask this court to make any citation of any substantial evidence? No. They just say, "Leave the issues hanging." And they say, "Oh, well, that has nothing to do with costs."

I don't know whether it does or doesn't, but I know the Commission was not content to stop with costs. This conclusion of the Commission was an integral part of their ultimate conclusion on the Midwestern division. They talk about costs and they had this paragraph about trends. If cost wasn't enough for them, why should it be enough for the court? An integral part of the Commission's conclusions, somewhere in the findings as a part of their conclusions, is simply not supported by substantial evidence and defendants don't claim it was. That is all there is to Issue 12.

I would like to speak briefly on the subject of passenger deficits. I will group, if I may, Issues 14 to 19, because it is a single concept. It raises a series of separate legal [fol. 1872] issues, but it all arises from the same concept.

Now, just by way of summary I should note that first we say the Commission applied an unlawful standard in saying what it did about revenue needs, an unlawful standard under 15(6).

Second, they made no finding to support the standard they used.

Third, there was no evidence to support the figures they used.

And, fourth, we were denied a fair hearing because they denied our offer to prove the necessary evidence.

First, with respect to this adoption of an unlawful standard, by definition the need for revenues—now, we are not talking about whether they found the amount, but we are just talking about any conclusion they drew, such conclusions as they did draw on this whole subject of revenues.

By definition we are talking about the revenues of the whole railroad. We are not talking about that part of the railroad allocated to transcontinental traffic, but we are talking about the revenue needs of the railroad.

The statute says—15(6) again—that it is "the expenses, taxes and a fair return on the carrier's railway property held for and used in the service of transportation". Not freight transportation, but transportation.

The Supreme Court held in the 1936 B & O case that [fol. 1873] the language at 298 U.S., at 360—the Supreme Court held that that language referred to the carrier's entire operation and all of their properties. That isn't to say the Commission can't consider the costs of handling the particular traffic, but we are talking about revenue needs of the carrier itself, the entire carriers, the railroads.

I don't understand that the defendants really dispute this is the standard. I think that what they—

Judge Crary: Don't they say they use it? Don't they say they consider it?

Mr. Trienens: I think that is it. I don't think they dispute what we said is the standard is the standard. I think what they say is that the Commission did not use that standard.

In our argument on the unlawful standard, we think the Commission based its conclusions, such conclusions as it did reach on the subject, on the standard of earnings of freight carriers. In other words, that part of the transportation operation which excludes revenue needs represented by passengers.

Now, it isn't a question of reading the Commission's report. I admit the Commission's style of writing in this case is hard to follow. I admit that there is a lot of chatter, a lot of discussion about a variety of factors.

In fact, the defendants want this court to find the first [fol. 1874] 11 pages of the Commission's report on revenue needs deal with matters other than the passenger deficit theory. That is true, they certainly talk about a lot of things in those first 11 pages, but when they were talking

about them every time they got to something important they said, "Ah, but, see, infra passenger deficit." This is all prelude, this is all built up to what they actually based it on, because when they get right down to it and they state their conclusions, such conclusions as they did on the subject to revenue needs, why the East should get more money, they did it in terms of revenue needs as freight carriers, part of the carriers' operations.

We think that is the only fair reading of the Commission's initial report. When they got right down to the conclusions that is the standard they used, which I think we all agree is unlawful.

If there is any doubt this is a direct reading of the initial report, it was certainly resolved in the supplemental report. When they got down to their summary paragraph, why they thought the Eastern lines should get more money —this appears on page 132 of our printed record—the Commission talked about revenue needs and said in its conclusion that it rested its opinion "on the earning power of the Eastern Roads as freight carriers". And in the next sentence it rejected data relating to all services. Now, [fol. 1875] that is the concluding summary paragraph.

Thus we think it plain from a reading of the Commission's order as best you can tell what it did, it based its conclusions, such conclusions as it arrived at, upon this unlawful standard which excludes revenue needs of a part of the transportation, namely, that part represented by passenger service.

Let's take it on defendants' view. Let's take their side of the reading of this report.

They admit that the Commission relied on passenger deficit. The Commission used the word "important" in both of its reports. The Government brief says the Commission made use of it. So they did rely on it. This raises the question, "Were there adequate findings to support their reliance?"

I defy you to tell what the Commission's reason is, for discounting revenue needs because of greater passenger

deficits. I think one would normally suppose that the greater your passenger deficit the greater your revenue needs, and not the other way around.

That is what the Commission has said in general rate cases. That is what the Supreme Court adopted when it accepted the view that passenger deficits necessarily must be compensated by earnings on freight if the carriers are to continue operations. That is the direction they have [fol. 1876] been going on all these other cases.

Now, this isn't a matter of mere inconsistency. The findings of fact and conclusions of law the defendants want the court to make say, "Well, they can be inconsistent. We admit it is inconsistent, but they have a right to be inconsistent. It is not for this court to tell them they have to deal with it in a fixed manner."

But when you do change your field and reverse your field in a matter of this sort the burden becomes greater, to explain so the court can understand just exactly what standards of the Act, what policy, what reasons they have for it, and that just isn't in this report. It is a separate violation of Section 8(B) of the Administrative Procedure Act.

Now, this reliance upon passenger deficit was arbitrary, was unsupported by evidence insofar as passenger deficit and freight earnings and passenger earnings were used to consider revenue needs.

Let me explain why that is. We are not saying that these allocations are wrong. We are not attacking the Commission's formula for allocating.

Sure, there is a passenger deficit because the passenger trains don't bear their fair share of painting the bridges and maintaining the tracks and maintaining the tunnels. We run these passenger trains over the same tracks, over [fol. 1877] the same bridges. They don't bear their share of these costs. The share is simply allocated. You paint a bridge and you allocate part of this to passenger and part to freight, and the passenger doesn't bear its share and there is a deficit.

We are not questioning the formula. The question is, what does it have to do with revenue needs? That is the question. It has been used in revenue needs. What has it to do with it?

The physical fact is, and we offer to prove this, the physical fact is, as stated by the Commission in many reports we have cited in our briefs, that the bridges have to be painted, the tracks have to be maintained, whether a passenger train uses these facilities or not. The cost has got to go on. If you want to run a freight operation, purely freight operation, you still have to maintain these policies.

The Commission acted arbitrarily in placing any reliance on these passenger deficits in considering revenue needs because there wasn't any evidence showing how much, if any, of this money, this money of common costs charged to passenger service could be saved if we discontinued the passenger service. If it couldn't be saved, these costs are a part of your costs as freight carriers. They are part of your costs of running a freight operation.

Indeed, when we started dealing with this, we said two [fol. 1878] things. First, so far as the record is concerned, there isn't any evidence at all to show that all the passenger deficit, every single penny of it, would not have to be borne by the freight operations, in any event, as part of our costs of doing a freight business.

We went further than that. We offered to prove our passenger trains produced $26,000,000.00 a year contribution, over and above the out-of-pocket cost of running.

What did the defendants do about that? They say and they want this court to find what I think is a question of transportation economics. They want this court to find a contribution in excess of out-of-pocket costs is a very different thing than a contribution of common costs. That is on page 75 of their findings. They want the court to find that. I don't know how the court could find that. I don't know how the Commission could find it without any evidence on the subject.

[fol. 1879] We offered to prove the facts. We don't ask this court to decide matters of transportation economics,

we don't ask the court to decide questions of costs allocation.

We do claim that the Commission, who has authority to decide these questions, has got to have evidence. The defendants don't claim the record has evidence, far from it. The finding of fact at page 75 of their document is this, they want this court to find as a fact, "There is no evidence in the record to support the assumption made by the Transcontinental Lines that passenger deficits result in the allocation to passenger service of expenses which are common to both the freight and passenger."

They want this court to find as a fact that there is no evidence. We agree with that. That is our point, there isn't any evidence. There is no evidence to support any such use of these passenger deficits because you can't evaluate them, you can't tell from this record how many of the passenger deficits are inherently a part of the costs of handling of freight operations, this revenue made as a freight carrier. That is just our point, no evidence. There wasn't any hearing on this, this is a wholly new concept that never occurred in any of the hearings. And when we offered to prove it, it was ignored.

Now, it is because of this passenger deficit concept here [fol. 1880] that the Commission really avoided facing up to what we regard as the problem of the Mountain-Pacific Roads.

We argued that the growing territory required cars, required facilities at a greater rate, we didn't have the money from the salvage to pay for them because we were growing. The Commission refers to our showing, it doesn't dispute it, it refers to our showing that the Mountain-Pacific railroads devoted eight hundred million dollars of added investment over a period of five years, without earning a single penny on that added investment.

Now, what is the Commission's response? This alleged deprivation results from passenger deficits.

Now, we think if the unlawfulness of the Commission's treatment of passenger deficits is correct, let's get that

out of this report. It is unlawful, it is an unlawful standard, if they make any reliance on it, they ought to have findings in the evidence.

But if we do that right, clear it out, we think the Commission can then consider and decide the basic revenue needs issue in this case, which is the amount of revenue actually required by these roads to serve their territories.

The last issues in the order in which we presented them to the court in the list arise out of the Commission's determination of cost of service. Now, this is a terrifying subject, it is one that involved a voluminous record. I [fol. 1881] want to make it perfectly clear that it is not our claim that this court should pass upon any determination of costs, enter any opinions on cost accounting principles, but should consider only purely legal issues which we think destroy the Commission's treatment, the Commission's brush-off of this cost problem.

Now, one of the issues that is highly material, highly important, it involves a third, a full third of the difference between the money that Eastern Lines would have been entitled to on our cost principle versus the amount they were entitled to under the Commission's restatement. A full third of that difference arose from a controversy which we don't ask this court to decide, but which, to identify it, involves whether you deal with these costs on a shipment-by-shipment basis—which is actually the way you divide rates, where you lump them all in the aggregate—

Judge Barnes: I can't understand you. What?

Mr. Trienens: The way you divide rates. In other words, when you divide a rate, you divide it one by one, we don't divide it wholesale. When we were pricing out these cars we did it shipment-by-shipment, just the way you divide the revenue, or whether you just lump it all together, arithmetically it produces a difference, a very material difference. The Commission concluded to use the aggregate method. They said that is our conclusion, from this hotly [fol. 1882] contested issue.

Counsel for the Commission say that stating that conclusion is enough. That is our conclusion on material issues and that is enough and the law requires no more.

But Section 8(B) says that is not enough, the law does require more. The law requires that the Commission also state its reasons, the bases for its conclusions on that material issue. They didn't do it.

Now, the Eastern Lines come in this court with a brief which tries to defend the Commission's conclusion by arguing this on the merits. They say that divisions on manufactured goods to Detroit ought to subsidize fresh vegetable traffic to New York.

Did the Commission adopt that rather exotic theory? There is no way of knowing. Would such a subsidy theory of subsidizing the New York lines from traffic to Detroit, would that theory be lawful under the requirements of Justice Brandeis' opinion in the Abilene case that each division must be fair and is not to be dealt with in the aggregate?

Those are fairly fundamental legal problems. But there is no way for the court to get at them because the Commission refused to state their reasons, or the grounds upon which it reached them. To require the Commission to expose these reasons was the very purpose of the Administrative Procedure Act. That is a basic defect in this Com-
[fol. 1883] mission's treatment of costs.

Now, Issues 21 to 23 deal with a single problem in different phases and different legal issues arising out of the same problem.

Let me say briefly what that problem was.

It dealt with a concept that perhaps isn't clear to us non-cost experts on the empty return ration. I think it is admitted here that empty return ratios have a material effect on anybody's cost setup.

Now, the situation is that the Midwestern and Eastern Lines were the complainants before the Commission. And they found that using averages, the averages of all traffic, that helped, that was good for their case. They liked averages.

Now, we are the defendants and we think that the costs ought to be developed to show the costs of the transcontinental traffic we are talking about. That is the basic difference in the principle between us.

Now, the Commission has agreed with us as a matter of principle. They found that the correct principle should be the cost of the traffic at issue, as contrasted with the average traffic.

So that is the Commission's basis and we agree with them.

But they didn't apply it. We applied it in making this [fol. 1884] empty return ratio study. We went out and made a study. We went out and we traced all these cars of transcontinental traffic and we got the data as to what the empty return movement was over our lines. We did the same for our lines in the Midwest and estimated, for the Midwestern group. We estimated for the East. We were trying to get the facts as to this transcontinental traffic.

The question before the court isn't whether our study is right, or any good. The question before the court is whether the Commission's basis for rejecting it is lawful.

Now, how did the Commission reject it? What was that basis? They didn't reject it because the study was inaccurate on our lines where we had all the data. They didn't reject it for that reason. They rejected it because we didn't make the same kind of study of the traffic as it moved over the midwestern and eastern railroads. Why? Because the data were not available to us. We estimated. We thought that put the burden on them to come forward with the data.

The Commission rejected our study, not because it is wrong, but because these complaining lines had data which were not available to us. That is the basis. It presents the legal question whether they can be permitted, these midwestern and eastern lines, can be permitted by the [fol. 1885] simple expedient of refusing to come forward with this data in their possession to benefit from these averages. The Commission expressly held they could. They weren't obliged to come forward with this data where

they had different conceptions of the nature and extent of the facts to be developed.

Judge Crary: Well, didn't the Commission use a lot of these ratios, a lot of this information that you had about your special purpose cars and your auto parts cars and your refrigeration cars? They used it and they arrived at a conclusion on this point, didn't they?

Mr. Trienens: They arrived at a conclusion—

Judge Crary: Relative to the return ratios?

Mr. Trienens: By rejecting, by rejecting all of our studies and substituting in their place the averages for all traffic.

Judge Crary: Yes. That is what I say. They said the averages for all traffic. And they also say that it comes very close to your study. Isn't that what they say? That the result is very close to your study.

Mr. Trienens: The result was very different from our analysis as to the Eastern and Midwestern Roads.

Judge Crary: Well, that is my recollection now. We will hear from the other side on that. But I think you will find that the result was very close to your study, by using [fol. 1886] the over-all—

Mr. Trienens: As to the Midwestern and Eastern Roads where the difference between the average and the actual, we think, was greater, it made quite a difference.

And that gets down to the question of whether the data upon which my opponents rely in showing there wasn't much difference are really the data the Commission used.

Judge Crary: Then the trouble is, of course, the trouble I have—I don't know about the rest of the judges—the method the Commission uses we are not concerned with, are we?

Mr. Trienens: That's right, that's right, I agree.

Judge Crary: Now here they used a method. You say that method rejected your method.

Mr. Trienens: That's right.

Judge Crary: Therefore their method is no good because they don't state why they rejected yours.

Mr. Trienens: No, they do state, in this case they do.

Judge Crary: Well, I thought you said a moment ago that they didn't state why they rejected yours.

Mr. Trienens: I am sorry.

Judge Crary: Your method.

Mr. Trienens: I am sorry—

[fol. 1887] Judge Crary: Maybe I am—

Mr. Trienens: They don't.

Judge Crary: Maybe I misunderstand.

Mr. Trienens: I am sorry, I did.

Judge Crary: But do they have to say why they reject your method, or any one method; if they adopt a method that they use, do they have to state why they refused other methods they propose?

Mr. Trienens: I think—and I think this is our point on the empty return ratios and others which I will get to in the summary—I think that if they find that the method they used had a reason and is supported by evidence, that is enough. If it is supported by rational findings in the evidence, that is enough.

Judge Crary: In this case they did give the reason, you say?

Mr. Trienens: In this case the reason they gave, the reason they gave—

Judge Crary: Was because they couldn't get the information from the Eastern Roads.

Mr. Trienens: The reason being that they will reject our study, no matter how good it is, they will not try to get the data from the other lines, will not impose upon them any obligation to come forward because they had their own conception of the issues. That basis they did state. [fol. 1888] That was their reason. And that reason is an unlawful basis.

Judge Crary: But they arrived at a conclusion on another theory. And are we to examine whether this theory that they arrived at, the theory on which they base their conclusion, is wrong? I don't think so here.

Mr. Trienens: No, I don't think that even arises in this situation because the reason they gave as to why these averages were satisfactory to it was that they rejected our study, not because we had done the wrong thing of trying to get the facts of the transcontinental—

Judge Crary: I understand why they rejected it, I understand that.

Mr. Trienens: And our point here is that the reason they used the average was because they rejected our study, and the reason they rejected our study was an unlawful ground.

Judge Crary: All right.

Mr. Trienens: And why was it unlawful? Because in the first place the Eastern and the Midwestern Lines are the ones that have the burden of proof.

The Supreme Court has further said that when a cost issue is raised the carrier should bring forward the data relating to its own costs that are required for the resolution of that issue. In other words, the parties in possession of the data should not be able to force the Commis- [fol. 1889] sion, in effect, to use the averages, because that is the best evidence in the record, by simply keeping from the record the data in their possession.

The three-judge court in the Boston-Maine case, 208 Federal Supplement, dealt with this specific point. The court said the Commission should not rely on these average costs just because they are comparable. And that is the reason they gave here, because they are comparable.

When the carriers who are relying on these average costs do not present data in their possession which are needed to show the actual costs of traffic initiated, they were referring specifically to a contention, and rejecting a contention of the New York Central in that case.

Sure, the basis was that the averages were comparable and ours weren't.

The reason they gave, the reason for rejecting our study, and for not requiring the other lines to come forward, those

complaining lines that had the data to come forward, that was the illegal ground.

Now, the cases show that the Commission is not entitled to be this passive about these cost issues. We have quoted those in our briefs. And the point I want to make now is what is the Commission's answer to that question?

They say, well, our power to compel these people to come [fol. 1890] forward with the data is not clear. This was their legal conclusion, our power is not clear.

Nobody tries to defend that. Section 20(1) of the Interstate Commerce Act gives them ample power. No defendant tries to defend that legal conclusion.

[fol. 1891] Our point here is that the Commission gave a specific reason for rejecting our costs. We think that reason is unlawful. We don't think defendants can come up with other reasons.

After all, under the principle of the Chenery case these administrative orders have to be upheld, if at all, on the ground stated by the agency, and it is not for the court or the defendants to supply additional grounds. In this instance the ground given was unlawful.

To contrast these remaining cost issues here, we are not talking at all in the remaining ones about whether the Commission rightly or wrongly rejected our study. What we are talking about now is the issue you alluded to, your Honor, as to whether there is support for they actually used, namely, these averages.

Let's take the next issue, which is Issue 24, and it is a nice, simple, factual situation. This is these empty return ratios on automobile parts. As you know, when you buy an automobile out here on the West Coast it is assembled in some Chevrolet or Ford assembly plant right out here in the Los Angeles area.

However, the engines and the fenders and the like are manufactured out East, usually in the Detroit area, Flint or somewhere.

We have a fleet of boxcars and they are all fitted so [fol. 1892] they hold the engines and fenders and they

haul them out here loaded and they go right back to the manufacturing plant. They are assigned, they shuttle back and forth, loaded out and empty back.

The operating facts in this record are uncontroverted. They got a hundred per cent empty return ratio over all these railroads.

The Commission's restatement puts in these averages which are higher in the East.

Now, this is indispensable as applied to this traffic, which is an important chunk, particularly of transcontinental east traffic. Nobody tries to defend the use of these averages for these cars as such.

Now, what defendants are asking this court to do now—and I might say this is not something that was taken up in the briefs, but this is done for the first time in these findings. They want this court to find as a conclusion of law that the empty return ratios used by the Commission for auto-parts car in its restatement produce service units which are in substantially the same proportion as the 100 per cent urged by transcontinental lines. In other words, it is de minimis. They are asking this court to make cost findings that it is de minimis.

This conclusion is presumably based on some fact they have on page 90 of this document. Now, page 90 is a [fol. 1893] replacement page we first saw Monday morning. The original page 90 had a whole, long series of numbers that didn't have anything to do with auto-part cars. It had to do with something totally different, so they replaced that, to support the same conclusion they want the court to make.

Page 90 has some formulas and has a couple of hypothetical calculations, none of which we have ever seen before. I never dealt with them in a reply brief, so I will mention it now.

We don't think it is the function of the court to get into all these numbers, to make cost conclusions, to make cost findings, but if the court has any relish for these

numbers games it might be interested in working out the formula shown on page 90 for Eastern lines. It makes a difference for the Eastern lines. They are trying to show it makes no difference for us, but it makes a difference for Eastern lines.

But what is missing really here is they don't show you the effect on any costs. They are just on the miles. So as a showing of what it really does, more realistically, anyway, put in a terminal, add a hundred miles to the East and a hundred miles to the transcontinental, just to represent a terminal. Work out this formula all over again. That would at least have some bearing on how it would operate on a cost calculation.

[fol. 1894] There you find it makes a rather large difference for the East and also makes a substantial difference for the transcontinental lines. I don't suggest the court work these out, but I do suggest if the court is going to enter into the making of cost findings and it is going to make findings as to what cost effects these have, that it do include a terminal and do figure it out for the Eastern lines, which hasn't been done here.

We don't think it is either factually or legally correct to find this admitted error was de minimis. What was all the fuss about? Why did they object to or resist doing such a sensible thing if it was de minimis? It hurt the Eastern lines to use the facts. That is why we did it. That is why they fought it.

Issue 25, which is in this complex area of maintenance-away cost, is another similar brush-off. The court may recall our brief dealt with a particular concluding finding of the Commission, and we said it was not supported by substantial evidence. To meet that defendants do not find substantial evidence, they don't cite any evidence to support that finding of the Commission.

What they do is they ask this court to make some findings on the merits of this highly controverted cost accounting theory of maintenance away. At page 130 they ask this court to state conclusions on the subject that the

[fol. 1895] Commission did not make itself. This is all a cover, we think, because defendants are completely unable to support the specific and concluding premise of the Commission, namely, this transcontinental traffic moves proportionately over all main lines in the Midwest, a premise that doesn't make sense, isn't supported by the record and the defendants don't attempt to support it.

Judge Mathes: What use is the Commission to make of this Form A if such a situation does not exist?

Mr. Trienens: Well, the dispute between us is not whether the Commission should use Form A. We used Form A. Our opponents used Form A. Form A is a very elaborate mechanism for breaking down line-haul and terminal costs. Each of the elements you start out with is an average.

The Commission recognized as a principle that when you can get the facts as to particular traffic you ought to substitute it for the average. Use the Form A framework, but do it justice.

Our whole effort, our whole study, which they restate, is a Form A adjusted study in which we took each element we could and tried to find the fact as to this particular transcontinental traffic, which is only a small segment of the Eastern traffic. Not use some average of all boxcars when you know that this auto-parts traffic is 100 per cent in all territories. But you substitute the actual [fol. 1896] facts into the Form A formula for these averages. You use the formula but you substitute the actual facts for this traffic to the extent you can obtain them.

Judge Mathes: The plaintiff's point is, as I get it, that form is adequate for its purposes,—

Mr. Trienens: We use it.

Judge Mathes: —but don't apply here.

Mr. Trienens: Oh, no. We used it here. What we say is—

Judge Mathes: It alone will not suffice.

Mr. Trienens: It alone will not suffice. I don't understand that to be a disagreement between us and the Com-

mission because they found it is correct as a matter of principle to use the actual facts. If you know how much it cost to gather a car of oranges you don't go throw in some average, but you put in the cost of gathering a car of oranges. They found that was correct in principle.

The problem is when you get to these important items, the Commission just took these actual figures out of ours and put in these averages. We are not attacking that wholesale. We are saying that the particular findings that the Commission made to justify what they did, in putting these averages back in those particular findings that we cite one by one and specifically, were not supported by substantial evidence.

[fol. 1897] In this series I am dealing with now defendants aren't really supplying any substantial evidence. They are simply saying, "Well, it is de minimis," and asking the court to make these calculations to try and show that, or they are trying to get the court to say, "Well,—" the next one is a perfect example of that.

They are saying, "The Commission made a finding and it was wrong and it is not supported by the record, but the Commission did not really rely on that. They said it, but the court is supposed to find, in effect, they didn't really rely on that."

Or the court is supposed to say, "Well, they found that and they relied on it, but there are a lot of other things that could have led to the same result."

That is what they want this court to do. They can't support these findings, they don't try.

They want the court to say, "Well, they can't support them, but they probably would have come out the same way, anyway."

How in the world can the court know that? How can the court know that if the Commission had not been misled by the erroneous evidence of the Eastern Lines and the length of these engine districts? How does the court know that has no influence on the result? How can the court

find the Commission did not rely on it? How can the [fol. 1898] court find that other factors would have led to exactly the same result? That is for the Commission to decide. That is for the Commission to decide without the influence of these findings which are clearly and now admittedly not supported by substantial evidence.

There are two of these items, the last two, as to which they just didn't make findings. They recited some contentions on refrigerator cars. They didn't make any finding about why they used the average or this element of value, property basis measure. They say, "Well, the Commission doesn't have to do it in detail in every case. They have done it in a lot of cases and they don't have to do it again." But they don't cite a single case where the Commission was dealing with the issue before it in this case. There just aren't any findings on those.

With respect to a number of these issues—now I am speaking more generally on this cost matter—defendants realize there are no findings and the best confession is this 130-page document they served. They recognize there are a lot of holes in what the Commission did. What is their answer to some of these? The answer is that this court ought to patch the holes by making findings of fact itself.

I would like to simply recite a few illustrations of that. Page 23, lines 16 to 27, the court is asked to find out what the cost percentage would have been if the Commission [fol. 1899] had applied the cost under the shipment-by-shipment method.

Page 23, lines 16 and 17, they want this court to find what the cost would have been if the Commission had done this or if the Commission had done that.

Pages 44 to 45, the court is asked to find boxcar costs, find they are correct and find they are illustrative, even though the figures introduced were rejected by the Commission.

Pages 45 to 47, the court is asked to find some costs of a terminal character, which are not so assigned under the

Rail Form A formula, which, as I read it, is an attack on Form A by these gentlemen in an effort to support the existence of the 15 per cent minimum. It is not the function of this court to find those costs, I don't believe.

Pages 57 to 58, the court is asked to find cost percentages on the basis of costs introduced in evidence by the Midwestern lines but never accepted by the Commission.

They are asking the court to make these and similar findings I have already referred to. They are recognizing deficiencies in the Commission's report. They propose that this court solve the problem for them by making findings of fact or conclusions of transportation economics which the Commission failed to make.

Judge Mathes: What was your reference as to page [fol. 1900] 23?

Mr. Trienens: Down at lines 16 to 27.

Judge Mathes: I have that. But the second one.

Judge Crary: Pages 57, 58.

Mr. Trienens: Page 23, lines 16 to 27.

Pages 44 and 45.

Pages 45 to 47.

Pages 57 to 58.

Those are all things they are asking this court to make these findings as to.

As I mentioned earlier, the principle of the Chenery case is that this administrative order may be upheld, if at all, on the basis of findings made by the agency.

I am not asking this court to make findings on these controverted issues of fact and transportation economics, often without any evidence. It is defendants—not plaintiffs, but defendants that are asking this court to inject itself into the areas of Commission expertise.

We are not asking this court to decide any questions committed to the Commission. We are asking this court to decide legal issues, applying specific statutes, specific deficiencies in the Commission's report, find an absence of substantial evidence, if there isn't any.

We think the claims we have made go to the heart of the Commission's treatment of costs, goes to the heart of such conclusions as the Commission reached on revenue [fol. 1901] needs and certainly goes to the lack of any basis for the provisions described as the ultimate order of the Commission.

I want to make it also clear in closing that we talk about the Commission this and the Commission that. I am not attacking the Commission as an institution. The Commission issues a great volume of orders. It is an organization of human beings. Its output is very often good, sometimes it is not so good. Its output is very often lawful. It very often makes adequate findings, reasonable findings on issues.

Often its orders are upheld. Sometimes, as in the Colorado case, its orders are unlawful. Sometimes they hark back to a pre-Administrative Act era in which a style of writing was designed to state facts and contentions and then never bridge the gap to the conclusions.

This particular order, from the same authors as the Colorado order, is of that character. It is a hark-back to that day, to a style of report-writing that Congress has condemned.

Now, a new era is at hand. The Commission is deciding, it is going to decide the case between the same parties, the divisions case involving many of the same issues. It is going to apply the standards set forth by the Colorado court. It is going to apply standards that the Commission acquiesced in, it didn't go to the Supreme Court to have [fol. 1902] them changed. The Commission acquiesced in it and said it would try the case in accordance with those standards.

We think under those circumstances it is simple justice under the law to have this important case, which we think is an anachronism so far as the administrative orders are concerned, this important case be decided in accordance with those same standards.

I am asking this court to set aside the Commission's order. We are not asking the court to make any new laws for us. We are not asking the court to expand the decisions of the Supreme Court or of other federal courts.

We earnestly request that the court apply the standards of the Interstate Commerce Act and the Administrative Procedure Act in accordance with settled law, to set aside these orders of the Commission in this transcontinental division case.

Thank you.

Judge Barnes: We will take a recess for five minutes before we continue.

(Short recess taken.)

[fol. 1903] Judge Barnes: All right.

ARGUMENT ON BEHALF OF INTERVENING PLAINTIFF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Mr. McCullough: Your Honors, my name is John E. McCullough. I represent the Katy and Frisco Railroads, two of the intervening—

Judge Crary: Is the reporter here?

Mr. McCullough: Yes, sir.

Judge Crary: Oh, I am sorry. I didn't see you. I wanted to be sure we were on the record.

Mr. McCullough: I represent the Missouri, Kansas and Texas Railroad Company, which I will refer to as Katy, and the St. Louis-San Francisco Railroad Company, which I will refer to as the Frisco hereafter, two of the intervening railroad plaintiffs in this case.

We filed two briefs in this court, one dated April 20, 1964, and the other dated August 7, 1964. We continue to rely upon all the arguments made in those briefs.

My remarks will be principally related to (1) the serious detrimental impact on the financial condition of these two railroads as a result of the orders and their financial effect on these two railroads; and (2) the drastic changes brought about by the Commission's orders from the his-

torical breakpoints which had been recommended by the Examiners.

[fol. 1904] I want it understood that we are, with minor exceptions, in agreement with the position taken by the plaintiffs and the other intervening plaintiffs in this case.

The present position of the Katy and Frisco is different from any of the other plaintiffs and intervening plaintiffs for the reason that in all the proceedings before the Commission they were aligned with the Midwestern Group of railroads. The Katy and Frisco continued in that group through the Examiners' proposed report and exceptions thereto, and it was not until the Commission's order of March 21, 1963, as amended by another order on June 20, 1963, which was issued to make effective not only a change in the measure but an entirely new formula of divisions on and after July 1, 1963, that we, in order to protect our interests, had no alternative but to withdraw from the Midwestern Group, whose interests were thereby made different from and conflicted with ours.

It was necessary for us to withdraw in order to protect our interests, because of the serious adverse financial effect and impact brought about by the drastic changes which were contained in the Commission's decision but were not contained in the Examiners' proposed report. The Midwestern Group of railroads is now an intervening defendant in this case.

The Katy and Frisco filed (1) a Petition for Modification [fol. 1905] and Reconsideration of the Findings, Report and Order of March 21, 1963, as amended, to eliminate the inequities and injustices to the Katy and Frisco Railroads; (2) a Petition for Leave to File Petition for Rehearing and Further Hearing which is required under the rules; and (3) a Petition for Rehearing and Further Hearing, to afford the Katy and Frisco an opportunity to present evidence to prove all of the facts which we alleged. In these petitions, we alleged among other things that the Commission's report and supplemental report contained

serious errors, failed to make the necessary findings, and that the record failed to contain essential evidence required to support a lawful order transferring the revenues of the Katy and Frisco to other financially stronger railroads or groups of railroads principally in the East and Midwest.

At the same time we requested that these proceedings be reopened for rehearing and further hearing in order to present evidence in support of our allegations which was not cumulative and which could not have been foreseen at the time the record was closed. This would have enabled the Commission to have all of the essential facts in the record and a full disclosure of the necessary evidence, as contrasted to a limited disclosure. Unless the Commission had all of the facts relating to the detrimental effect of its orders on the Katy and Frisco, it would be unable to [fol. 1906] give proper consideration to the proceeding or meet the statutory tests either under the Administrative Procedure Act or Interstate Commerce Act.

In these petitions we alleged, among other things, that the Commission's order of March 21, 1963, as amended, would not afford the Katy and Frisco just, reasonable and equitable divisions to which the statute entitled them, but on the contrary would cause them to sustain severe losses which they could not afford. Further, that the Commission's order failed to contain the necessary findings, and the record failed to contain the necessary evidence, required to support a lawful order transferring the revenues of the Katy and Frisco to other railroads.

In our petitions we advised the Commission that its orders would cause the transfer annually of approximately $420,000.00 of the Frisco's revenue, and $132,000.00 of the Katy's revenue, to the Eastern and Mountain-Pacific Railroads, would severely injure the Katy and Frisco, and would not solve the basic problems of these two groups of railroads one iota.

The Frisco would suffer losses amounting to about 9 per cent of the net income for the year 1961, and with the same

loss in income in 1962, the loss would be 6.5 per cent of its net income for that year.

Had the proposed divisions been in effect in the year [fol. 1907] 1961, the Katy's loss on freight traffic in that year would have been $132,050.00 which is 95 per cent of its net income of $139,202.00 in the year 1961, and which is $119,714.00 more than its net income of $12,336.00 in the year 1962. Stated differently, the proposed divisions would have reduced Katy's net income to only $7,152.00 in 1961, and would have caused a deficit of $119,714.00 in Katy's net income in the year 1962.

In the court proceedings for the interlocutory injunction of August 3, 1963, it was not disputed that the Eastern Lines stand to gain something in excess of $23 million annually and that the Midwestern Group, excepting the Katy and Frisco, stand to gain approximately $7,730,000.00 annually. Thus, two major groups of railroads stand to gain millions of dollars annually on the basis of aggregate or average data which is in this record, while the Katy and Frisco would have severe losses.

We believe the Commission committed error in denying our petitions and committed further error in failing and refusing to afford us an opportunity to prove the facts that we had alleged in our petitions.

Ordinarily, in a case such as this, the Commission, through the device of Exceptions to an Examiner's report and/or Petitions for Reconsideration of a Report of a Division of the Commission, or Petitions for Reconsidera- [fol. 1908] tion of a Report by the entire Commission, such as this, have been advised of the effect of its order upon the various parties. And I would amplify this effect because I think it is quite important. However, the revolutionary changes, not only in the present Transcontinental divisions, but also the radical changes from those recommended by the Examiners, brought about by the Commission's orders, created serious procedural difficulties. Thus, for the first time, the full impact upon the Katy and Frisco

was not known until after the Commission's order of March 21, 1963, was issued, as amended by its order of June 20, 1963.

Those petitions which we filed with the Commission gave us our first opportunity to take exceptions to many matters which were not contained in the Examiners' proposed report, but which are contained in the Commission's reports.

We would like to emphasize as strongly and as strenuously as possible the unlawfulness resulting from the Commission's denial of our Petition for Rehearing and Further Hearing, also our Petition for Reconsideration.

In those petitions, by illustration, we set forth clearly the percentage reduction in relative revenue loss which the Katy and Frisco would suffer by virtue of these orders. It was also pointed out that those results in the aggregate were more severe on the Katy and Frisco than on other carriers operating in the Midwest because of their opera- [fol. 1909] tions being limited so extensively within the Southwestern States.

This is significant since, during the entire proceedings before the Commission, all the parties were visualizing an ultimate order which would continue a formula of divisions embracing the recognized existing divisional gateways or break-points and their respective significance as to whether they were primary, secondary or subdivisional break-points or dividing points. All of the traffic evidence was introduced in that perspective. Prior to the Commission's order of March 21, 1963, a recommended order and report of Examiners continued that format of break-points.

The Examiners' proposed report, though inadequate, obviously would not have materially altered such divisions formula for break-points. Therefore, the arguments before the entire Commission were presented without any evidence indicating that the value of these respective divisional gateways would in any way be altered.

As a result, the entire record before the Commission reflects existence of primary divisions on Midwest-Transcontinental traffic and primary subdivisons on Eastern-Transcontinental traffic for the benefit of not only the Katy and Frisco but other carriers in Midwestern Territory when interchanges occurred at such gateways as Kansas City, Wichita, or Omaha, with all western connec-
[fol. 1910] tions or at such gateways as Oklahoma City or Fort Worth, with the Santa Fe.

However, the Commission's order drastically changes the formula for determining divisions by establishing a primary division break-point at the intermountain gateway, such as El Paso and Denver, on a theoretical line running North and South from El Paso through Denver to the North, and points along the eastern borders of Montana and Wyoming, with a further subdivision between the Transcontinental Lines and the Midwestern Lines at their actual interchange points, such as Minneapolis, Omaha, Kansas City and Fort Worth, Texas.

The report of the Commission thus changed the historical break-points and demoted these former primary division break-points to a subdivisional status by this drastic change.

This, among other things, brought about drastic changes in the divisions, as well as the revenues of the Katy and Frisco, resulting in serious revenue losses to both carriers. Again, our petitions of July 26, 1963, were the first opportunity we had to call this to the Commission's attention while it still had jurisdiction of the subject matter, in order that it could correct this injustice. The Commission completely ignored our pleas in its supplemental report where it denied our petitions.

In prescribing primary divisions for the Midwestern
[fol. 1911] Lines over the intermountain gateways, no one —not even the Commission, could know the effect their order would have on any individual railroad because of these changes:

1. Via some routes where the carriers have no agreement or where there has been no necessity for agreement providing for subdivisions, nevertheless subdivisions would be required as a result of the order to or from the Intermountain gateways;

2. There is no evidence in the record or any specific remedy prescribed for this lack of subdivision percents in the Commission's reports;

3. No one—not even the Commission, could visualize what such ultimate agreements might be or what the effect would be on individual carriers. This would be really getting out the crystal ball.

The brief filed jointly by the United States and the Interstate Commerce Commission at pages 48 and 49 discloses a similar plight raised by the Transcontinental Lines for account of the D&RGW and dismisses their position with the following language, and I quote:

"Under these conditions the Rio Grande cannot complain that the Commission's orders are invalid because the other plaintiffs cannot be depended upon to accord it the just and reasonable subdivisions which they are re- [fol. 1912] quired by law under (Section 1(4)) to give to the Rio Grande. If no satisfactory agreement can be reached, the Commission can always be requested to prescribe divisions which will be just, fair and equitable under the circumstances."

This is no answer, particularly for carriers in the geographical area of the Katy and Frisco, since each set of negotiating carriers would have a separate interest in each of its own preferential routes.

[fol. 1913] The negotiations would be multiple, they would be endless and conflicting, resulting in a lengthy period of months or even years without final consummation. Meanwhile overhead or originating carriers, such as the Katy and Frisco, would be at the mercy of the destination or

settling carrier as to the settlements that were made, and would be without recourse for the reason that the Commission under that would have no power to prescribe retro-effective divisions and any order that they do lawfully issue must be made effective at least from its service date.

I believe Judge Mathes raised a question along those lines. I hope that does answer your question. The Eastern Railroads, in their briefs at pages 153, 157 and 158, express an opinion that they be held aloof from any of the claims made by the Katy and Frisco by contending that our difficulties arise solely in the subdivisions west of the Eastern gateways and, therefore, have no relationship to the initial complaint filed before the Commission in Docket No. 31503. In other words, they would stay in their own territory, generally speaking, east of the Mississippi River, and leave it to the mercy of the Western Roads to put their own house in order.

All of the complainants before the Commission were handled on a joint record. Since "revenue needs" is apparently one of the principal findings of the Commission, [fol. 1914] it should be understood that before any subdivision of revenues can be determined, the revenues prescribed under the order is first deducted from the entire amount for the sole benefit of the Eastern lines, before the remaining revenues can be subdivided for those carriers west of the Mississippi River.

Further, we call attention to the fact that on all eastbound traffic to stations in the Eastern Territory Eastern carriers would be required under the American Association of Railroad Accounting Rules which we have all adopted, to make the settlements, and they would then be making arbitrary settlements in the absence of prescribed or agreed subdivisions not available in connection with the prescribed divisions resulting from the Commission's orders.

The Midwestern lines, in their brief dated June 22, 1964, at page 103, admit that the other Midwestern lines would

suffer under—that other Midwestern lines would suffer under the prescribed basis. They are apparently willing to ignore the losses incurred on their lines via a route similar to those of the Katy and Frisco, because of the fact that the Commission's order would preserve their present primary division on the vast volume of their traffic which those carriers interchange at the Intermountain gateways and would be handled through the gateways at Kansas City, Omaha, and et cetera, without interchange [fol. 1915] to or from stations in the Midwestern States east and south thereof.

In its supplemental report the Commission not only refused to accept the proffered testimony, but summarily denied the Katy and Frisco the opportunity of presenting such testimony and evidence.

The Commission, in refusing to receive this evidence proffered by us, failed to have any evidence showing that the conditions under which these two railroads are operated were like or unlike the conditions under which other railroads are operated in their territory. Neither did it know the serious detrimental impact of the losses upon these two railroads when it issued its supplemental report.

It is our position that Section 15(6) of the Act uses the words "as between the carriers", "such carriers or any of them", "by the several carriers", and it does not use "groups" or "between groups", as stated in the Commission's reports.

We feel that this violates Section 15(6) of the Act and Section 8(B) of the Administrative Procedure Act as held by the Colorado court in the Santa Fe case that Mr. Trienens has previously referred to, and I particularly call the court's attention to pages 605 through 607 in that decision, relating to that point.

Starting on page 37 of our August 7, 1964 brief in this court, we fully discuss our position and we will not repeat [fol. 1916] it here.

In plaintiff's Issue 8(C) we take the position that the record does not contain evidence typical in character and

ample in quality to support the Commission's prescription of divisions over the routes embracing the Katy and Frisco.

On pages 3 through 10 of our August 7, 1964 brief we fully discuss this subject and, in view of the limited time, we will not repeat it here.

This also applies to plaintiff's Issue 13, which we discussed in our brief on pages 31 through 37.

We believe the court should particularly adopt plaintiff's proposed findings in numbered paragraphs 3, 8, 10, 13 and 18 and plaintiff's proposed conclusions of law in numbered paragraphs 7, 8, 9, 12 and 17, which are of particular interest to the Katy and Frisco.

For the reasons stated, we request the court to set aside, annul and suspend the orders of the Interstate Commerce Commission previously referred to.

Unless the court has some questions that concludes my presentation.

Judge Crary: What is the portion of your brief you say treats with the question of the division between groups as not being sufficient—I know 15(6) says "carriers".

Mr. McCullough: Right.

[fol. 1917] Judge Crary: Rather than "groups". Do you have any authority on that with any cases cited in your brief on that point?

Mr. McCullough: I think that—

Judge Crary: That is the answer of the Eastern Roads to it. The Commission says, "Well, this is a subdivision matter between roads in the group and we are only deciding the divisions within over-all groups."

Mr. McCullough: I think if—

Judge Crary: I wondered if you had any authority—

Mr. McCullough: I think, your Honor, if you go back to the first primary division among carriers, starting with the divisions case, the New England divisions case before the Commission, which was the granddaddy of all of them.

Judge Crary: Does any portion of your brief treat with that point?

Mr. McCullough: I am particularly relying on that point in the Santa Fe case, 225 Fed. Supp., page 584 and following.

I think those cases alone, and I might also say that I believe the Abilene case, which was before the Supreme Court, touched on that matter, where they said that each division must be fair and if each division must be fair they are talking about individuals and not groups.

[fol. 1918] I would say in answer to your question there are three case precedents for that position.

Judge Crary: Thank you.

ARGUMENT ON BEHALF OF THE INTERVENING PLAINTIFFS PUBLIC UTILITIES SERVICE COMMISSION OF OREGON, et al.

Mr. Weisser: May it please the court, my name is John F. Weisser. I am representing the 9 Western States Regulatory Commissions other than California. These states include Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington.

My argument is directed basically toward issues 14 through 19, which have been covered rather well by Mr. Trienens. I don't intend to repeat those portions, but I do have a few other points I would like to bring out.

Our position in this case generally has been toward the revenue needs of the carriers and we have not considered any of the issues as to cost, so our interests are basically in the revenue needs requirement.

As has been already stated, the issues cover—Issues 14 through 19—cover the passenger deficit theory which the defendant the Interstate Commerce Commission injected in this case. A review of the reasons for the use of this theory, I think, will be helpful to this court.

The deletion of the passenger deficit was made in the [fol. 1919] examiner's report for the first time to counteract a question which was presented by these intervening plaintiffs, as to where the moneys for the growth of the plant facilities in the West was to come from. There is

apparently no argument about the Commission's substantial reliance upon this theory in its report, but I think if we go back and look at just how it came about it would be of some help.

We presented our evidence before the hearing examiners as to the public need in the Western States and then we argued the points before the hearing examiners and we pointed to the need for additions in plant and facilities in the growing West and the fact that the East is a contracting situation and there is not as much need for plant there.

We pointed out that revenues could not be obtained from further rate increases because of the nature of the commodities shipped from the states I represent. We then put to the examiner what we thought was the crucial question in the case, and it was in this form: We asked them where then is the money to come from to provide the additional facilities and to maintain the earnings of the Mountain-Pacific carriers, if these divisions go into effect as proposed.

The examiners answered this only in terms of the passenger deficit. No party had suggested that this was the [fol. 1920] proper form or the proper tack to take in either evidence or in brief.

However, the examiners in their initial report concluded that the Mountain-Pacific Railroads could have saved some 67.8 million dollars in the year 1959 with the sympathetic assistance of the State Regulatory Commissions. This is the quote that views that thought and it states—it is in the printed report at page 207—that is the large volume that was furnished by the principal plaintiffs:

"The obvious answer to the question stated by the Mountain-Pacific Commissioners is that the reduction in passenger deficit, which would seem to be imperative sooner or later, would help materially in furnishing funds for additions and betterments. The intervenors are in a position to assist in such a course by taking a sympathetic

attitude for the discontinuance of unprofitable passenger service. The American railroads other than defendants in 1959 had a total passenger deficit of 15 per cent lower than they had in 1948. If defendants had been able to do so they would have saved 67.8 million dollars in 1959."

Now, the proposed findings before this court which we have offered, that is, under Issue No. 17—it is Proposed Finding No. 22—which the defendants apparently do not [fol. 1921] refute, is there is absolutely no evidence to show there would be any sort of saving that would follow any sympathetic attitude in this passenger deficit field. In fact, there was absolutely no way of telling what savings there could have been from discontinuance of passenger service as the examiners suggested.

In fact, we really don't believe there is any great possibility of making savings from the discontinuance of passenger service and we tried to show this to the examiners and again to the commissioners when they took the case.

The reasons have been outlined why the chances for saving of passenger deficits are remote. For instance, a bridge needs to be painted again, the overhead cannot be done away with altogether, and when we consider that in light of the relatively small amount of passenger service that exists in the Western States, we feel they are holding out something that just isn't there. There isn't any possibility for that kind of savings from passenger deficit.

We objected to the reliance of the examiners, as I mentioned, and we offered to prove in our exceptions that there had been a substantial decrease in passenger service in the Mountain-Pacific Territory in the ten years between 1950 and 1960.

The Commission, however, ignored our offers of proof and they adhered to the very same passenger deficit theory [fol. 1922] the examiners had maintained. They did, however, delete this paragraph I read here about the sym-

pathetic attitude and the amount of money they could expect to save, but they did not, however, delete the reasoning that the examiners had undertaken.

Now, if the court would examine at its leisure the findings of the examiners in their recommended report on pages 31 through 33, with what the Commission adopted on pages 66 and 67 of their original report, they will see they are virtually identical. The whole thrust of the passenger deficit theory remained in the case when the Commission rendered its report. We objected to this reliance and asked in our petition for reconsideration that the Commission again review our exceptions, including the study that we had offered as part of our offer of proof, to show there wasn't a substantial overbuilding of passenger service. These offers were ignored and then this led into the errors Mr. Trienens has gone into on Issues 14, 15, 16, 17, 18 and 19.

Basically, as he stated, they are that the unlawful standard was adopted. I think that has been sufficiently covered by his reference to the Act itself and to the Baltimore & Ohio case.

He also mentioned, and we concur in this, as we do with the other point, that there are not adequate findings under Section 8(B) of the Interstate Commerce Act. And there is [fol. 1923] one other point I think should be made there, and that is there is not only findings, there is the issue of consistency, as he mentioned before.

Judge Barnes: 8(B) of the Interstate Commerce Act?

Mr. Weisser: Strike that. The Administrative Procedure Act, your Honor.

[fol. 1924] The consistency would be with other decisions in general rate matters and in the Section 13 cases where the Interstate Commerce Commission imposes interstate rates on intrastate traffic. We feel that, as in the King case when this was done, it sets a general pattern whereby the passenger deficit is in, when you consider the level of the rates. But if we at this time say that the passenger

deficit comes out when you consider the division of those rates, we have a basic inconsistency. And it seems to me to be unfair to the person that pays the rate.

The level is set, but when it comes to dividing between the carrier who supplies him with the originating service, the equipment that he needs, the facilities that he needs, that we have a basic inconsistency. And this inconsistency at a minimum has not been explained. And we feel therefore that this is another error that should be considered by this court.

The further error mentioned was the disregard of passenger deficits being arbitrary because there was no evidence to support the findings, or the inference or conclusion that there would be any savings from the actual abandonment of passenger service. And we submit that if money cannot be saved from a discontinuance of passenger service to meet the revenue needs, then this is a completely illusory theory and is fundamentally wrong.

[fol. 1925] Issue 18 of these issues contended by the plaintiffs dealt with the denial of a full and fair hearing. We, too, feel that that is a basic error in the Commission's action here. There was no hearing at all on the claimed passenger deficit issue. There was no evidence which would suggest that the passenger deficits could be disregarded, no parties advocated this position, and the philosophy—as I have pointed out—was a pure creation of the examiners to counteract the question we posed as to where the money would come from to continue to meet the needs of our shippers.

As I mentioned before, the offers of proof were made and were not even recognized by the Commission in its orders. The defendants have characterized our actions in making these offers of proof, particularly the major plaintiff railroads, as being devious and oblique. But we submit that we did everything in our power to bring this issue before the Commission and to get them to realize that they had erred on this theory.

We feel that this denial of a full and fair hearing, since it was brought to them in a timely manner and with all the power we had to bring this issue before the Commission itself, forms an independent error, and that based on that and the other errors herein, that the Commission's order should be overturned.

Judge Barnes: All right. Mr. Saroyan?

[fol. 1926] Mr. Saroyan: Yes, sir.

ARGUMENT ON BEHALF OF INTERVENING PLAINTIFFS, PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION

Mr. Saroyan: As you gentlemen know, I represent the People of the State of California and the California Public Utilities Commission. I am going to be very brief. I hope I will only take eight or ten minutes or so.

Essentially I will touch upon the basic revenue needs issue, which is Issue 19, the passenger deficits and the novel passenger deficit theory, Issues 13 and 18, and the findings defects and the requirements under the Administrative Procedure Act which are Issues 1 through 6 and 9 through 11. And I hope that what I say might help to supplement what my colleagues have already said.

The legal grounds which require that the Commission's orders be set aside have been rather thoroughly discussed, I believe, by the plaintiffs and intervening plaintiffs. And our views are on file in the two briefs that are before this court. I don't believe I should take the time to repeat any of the arguments that are in those briefs.

I do like to state, though, however, for the record—to emphasize, I might say—once again why California is participating in these proceedings.

Now, the significance to the people of California of the legal errors which have been discussed becomes apparent [fol. 1927] only in the light of the reasons for our participation. Now, our basic interest stems from the recognition

of the unusual situation which faces the railroads serving the fastest growing state in the country.

These railroads, like all other public utilities in California, are faced with an ever-increasing need for making new investments commensurate with the growth of the economy of the state.

In the case of other utilities here in California—and I am speaking in terms of the gas, the electric, telephone utilities, these added investments are compensated by additional returns upon such investments. For every dollar that is prudently invested in this growing state by these utilities additional earnings and a fair rate of return are realized.

Now, in the case of the railroads, on the other hand, it is very apparent from this record, from this case, that the situation has been quite drastically different. The railroads have not realized any additional earnings from the new investments that they have made to provide the rail service which is so very vital to this growing area. Quite the contrary. And as the Commission itself acknowledged, and which Mr. Trienens has discussed at some length, during a five-year period the railroads serving the West increased their net investment to the tune of some eight [fol. 1928] hundred million dollars. "But this increase in investment produced not one penny of earnings."

Now, under these circumstances it seems to us that the complaints filed before the Commission by the Eastern and Midwestern Groups for increased divisions from these transcontinental traffic—divisions from the transcontinental traffic constitute a rather serious threat to the public interest of our state.

Bear in mind that the claims of the Eastern and Midwestern railroads were based wholly upon showings of territorial average costs and territorial average rates of return, without any explanation at all as to why these changes in costs and earnings had occurred. Thus, it would seem to

us that the whole basis for the Eastern and Midwestern railroads' complaints for increased divisions lay in the growth, the rapid growth, I might say, of the economy of the West.

Because California and her neighboring states were obtaining a larger share of the nation's industry, to the detriment of the East and the Midwest, the average costs of the railroad serving these relatively stable or contracting areas, as we said in our briefs, had gone up, and their average rates of return had gone down. And these railroads were in effect seeking a fund to be created from the divisions of the Western railroads on transcontinental traffic in order [fol. 1929] to make up for these losses.

Now, given the financial situation of the railroads serving the far west, as I described a moment ago, and which the Commission itself has acknowledged, if these Eastern and Midwestern Groups were to be successful in their demand for increased divisions, the responsibility of the Western railroads to make new improvements to meet the rapid growth in California, and in the West, would be even more burdensome than it has been.

And bear in mind that the record indicates that such an investment has been made for several years without the prospect of increased earnings.

Accordingly, California believes that the paramount public interest of its people demanded that we oppose these complaints by the other two large railroad groups.

I would like to state that we did not ask that the divisions of the Western railroads be increased. But we did oppose any reduction in those divisions as basically inconsistent with the right of California to a transportation system which would permit the full realization of its economic potential.

Now, we don't feel that the Commission has resolved the basic issues raised in these proceedings. And this omission constitutes error in their reports.

[fol. 1930] We do not claim, and have never claimed that the Commission was compelled by law to decide the case in accordance with the views that we have expressed. But certainly it is obligated to consider those views and to make findings on each material issue which we raised. This we feel it has not done.

Instead it virtually ignored our participation in the case and made no findings at all to justify its disposition of the basic revenue needs issue.

And that takes us right into the passenger deficit theory. Actually, what the Commission did—what they did here was to foreclose the revenue needs issue raised by the parties by reliance upon its own novel passenger deficit theory. The legal defects of this decision have been gone into and California, as intervening plaintiff, agrees completely with the stand all of the other plaintiffs and intervening plaintiffs have taken. And I only add that California is also vitally interested in maintaining passenger service for its people.

Additionally we feel that the continuation of passenger service in this state is being threatened by the Commission's decision in this case. There is not the slightest evidence in the record that the passenger deficits of the Western railroads represent expenses that could actually be saved in their entirety by the discontinuance of passenger [fol. 1931] trains.

If the Commission is permitted to assume that such savings are possible, in the absence of evidence here, we feel that it might be tempted to do so in every discontinuance of proceeding in which a railroad seeks to cut out passenger services. And believe me, these things are coming through fast and furiously.

And if the Commission adopted that approach in discontinuance cases the public interest in maintaining marginal, and even slightly submarginal passenger service wherever possible and where public convenience, or as necessity dictated, might well be lost in a sea of paper passenger deficits.

We believe we are entitled to have the Commission announce and apply a rational standard of avoidable costs in passenger train discontinuance cases in order that we may effectively defend this public interest in accordance with our duties under state law, and certainly our right under federal law.

Now, if I may take a moment or two with respect to the findings defects and the Administrative Procedure Act, and certain sections of that Act.

I would like to comment, briefly comment on the Commission's repeated insistence in its brief, and in the proposed findings and conclusions filed in this court that the [fol. 1932] decisions in administrative proceedings are matters of expertise, judgment and discretion, apparently with respect to which it need not make reason findings or disclose the basis of its decisions.

Now, gentlemen, as a state administrative agency charged with the responsibilities of deciding questions not at all unlike those that are presented to the Interstate Commerce Commission, the Public Utilities Commission of the State of California takes vigorous exception to this approach. In our view it is contrary to the fundamental foundation upon which all administrative law is based.

As we stated in our opening brief and I refer to California Motor Transport v. Public Utilities Commission reported in 59 Cal. 2d, the Supreme Court of this state has made it abundantly clear that it will not sustain any of our own Public Utilities Commission decisions by mere acceptance of any such unexplained plea of expertise or informed judgment or discretion. That case requires our Commission to make separate findings of fact on each and every material issue in its opinions and decisions.

The California Motor Transport case rested actually upon the California Supreme Court's application of a state statute quite similar, but certainly less sweeping than Section 8 of the Administrative Procedure Act. And as you [fol. 1933] will recall we quoted in our brief a portion of

Justice Traynor's very splendid opinion in that decision. In reaching this decision it can be seen that the California court relied upon precedents under the Administrative Procedure Act to construe the state statute.

It would be ironic, indeed, if the Administrative Procedure Act were held to be worth more as a guide in construing a California statute than it is as a matter of positive statutory law to be applied to the very federal agencies to which it was directed by Congress.

And I might add it seems to me to be even more ironic that California's railroads were deprived of these basic federal protections in proceedings such as this one held some 3,000 miles away in Washington, D. C., when they have actually been effectively assured to California's other public utilities which are regulated by our own state commission.

Now, the Administrative Procedure Act and Section 8(B) of that Act either means something or it doesn't. And as Mr. Trienens has brought out the Colorado case, United States District Court in the Colorado case reported in 225 Federal Supplement 584, Santa Fe v. United States, there the court cited, it quotes the Burlington Truck Lines case. And in doing so it says:

"The Supreme Court has recently emphasized that this [fol. 1934] section is intended to have teeth."

And, gentlemen, we believe it does have teeth and these decisions by the Interstate Commerce Commission should adhere to those requirements.

We respectfully urge that the Commission's orders be set aside and their enforcement be permanently enjoined.

Judge Barnes: That concludes the plaintiffs' presentation?

Mr. Trienens: Yes.

Judge Barnes: We will take a recess until 2:00 o'clock p.m.

(Whereupon at 12:00 o'clock noon, an adjournment was taken until 2:00 o'clock p.m. of the same date.)

[fol. 1935]

Los Angeles, California, Thursday, November 19, 1964.

2:00 P.M.

Judge Barnes: All right, Mr. Cerra.

ARGUMENT ON BEHALF OF THE DEFENDANTS UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Mr. Cerra: If it please the court, my name is Arthur J. Cerra, Assistant General Counsel of the Interstate Commerce Commission. I appear today in defense of the Commission's order under attack on behalf of the statutory defendant United States of America, as well as the Interstate Commerce Commission.

Now, the assailed order of the Commission that is before this court disposed of two separate and distinct cases involving some 350 railroads in the country. While the suit is against the United States of America as the statutory defendant and the Interstate Commerce Commission as the administrative agency issuing the order, it is in essence primarily a squabble between the railroads. They were unable to settle the squabble and they came to the Commission which is empowered under the provisions of Section 15(6) by delegation of Congressional authority to administer this Act and to settle and find for the future what will be just, reasonable and equitable decisions.

The Government, of course, is here to vindicate its order, [fol. 1936] but beyond that—

Judge Barnes: What about the lack of appeal in 225 Fed. Supp.?

Mr. Cerra: The answer to that is, your Honor, there was no evidence, typical evidence of these rates and divisions, and we felt that there was no sense in processing an appeal to the court if the Commission didn't have the information before it to make a decision, so we recom-

mended against an appeal and the Commission did not appeal the case.

They reopened it to attempt to acquire this evidence, and when the parties told them that they thought that there ought to be new cost studies and new traffic studies to bring the information up to date, the Commission said, "Well, this thing has been pending a little too long. We will give you the opportunity to come back before us on a complete new showing, but we don't think we ought to progress on that basis."

That is the simple answer to it.

Judge Crary: Are you going to distinguish that case from yours here?

Mr. Cerra: Distinguish it on that ground, your Honor?

Judge Crary: No, I say do you propose to distinguish it?

Mr. Cerra: We say that this Colorado decision case [fol. 1937] was correct in the principle they applied as to the typical evidence. So we will perhaps.

Judge Crary: You say it doesn't apply here?

Mr. Cerra: It only applies in a small instance, your Honor. The typical evidence rule pertains to only 22 places where the transcontinental railroads claim there is no evidence at all. They make further claims as to the essentiality of requirements and these will be discussed later on, whether you want to call it a distinguishing fashion or an explanation fashion, by other counsel.

The point I was trying to make, beyond the fact the Commission and the Government are here to defend the Commission's orders, to vindicate what it has done, we are vitally interested in the outcome of this litigation because of the consequences that would follow or would result to the proper administration of Section 15(6) if some of these contentions or all of them or any of them of the transcontinental lines were sustained.

There are numerous legal issues involved. By order of the court we have set forth some 30 issues. The court has also permitted the Eastern Railroads and Midwestern

Railroads as groups to intervene as defendants in support of the validity of the Commission's order.

While the Government and each of these railroads have filed individual briefs giving the reasons they think the [fol. 1938] Commission's orders are valid, we all have a common interest. We want to get this order sustained. And it is our intention here this afternoon to present oral argument in a fashion to avoid as much as possible any repetition or duplication.

Accordingly, on that basis, we have decided to divide the arguments, and in dividing the arguments, while the attorney arguing might appear to be an Eastern Railroad lawyer or a Midwestern Railroad lawyer or a Government lawyer, for the formulation of argument we will operate one team and we are going to present it in that way.

Mr. Kaier, with the court's permission, will argue the question pertaining to revenue needs and findings as to revenue needs, Issues 1 to 4 and 14 to 19. These are the issues I referred to as formulated in the joint statement submitted to this court.

Mr. Belnap will argue the cost issues, 20 to 29.

Mr. Eshelman will argue Issues 6, 7, and part of 8.

Mr. Hamilton will follow with Issue 5 and the remaining part of Issue 8, and Issues 9 to 13.

Finally I will conclude with a short summation.

With the court's permission, I would like to turn the argument over to Mr. Kaier now.

[fol. 1939]

ARGUMENT ON BEHALF OF THE INTERVENING DEFENDANTS THE BALTIMORE AND OHIO RAILROAD CO., ET AL.

Mr. Kaier: May it please the court, my name is Edward Kaier. While my appearance is on behalf of the Eastern Railroads, as Mr. Cerra has said, I shall argue on behalf of all the parties on the defendants' side Issues Nos. 1 to 4 and 14 to 19.

Before turning to a discussion of the issues that have been assigned to me, I should like to add something to the statement of the over-all case.

The joint rates between the Midwest and transcontinental territories were established in 1887—I am sorry—1874. Those between the East and transcontinental territory in 1887.

The division of those rates were what we referred to as missionary divisions, designed to give the transcontinental lines, which had only recently been built in this sparse territory, considerably larger shares of the joint revenue than would have been warranted simply on the basis of the relative amount of service performed.

This is truth both as to traffic to and from the East and traffic to and from the Midwest. Thus, in describing the history of the divisions between Midwest and transcontinental territories, the Commission stated that the earliest divisions were based upon some form of construc- [fol. 1940] tive mileage under which the factors for distances west of the Missouri River were inflated by 150 per cent of the actual distances.

In other words, the line from, let's say, Chicago to Omaha would get its actual distance. The line from Omaha to San Francisco would get its actual distance plus 50 per cent. And the resulting relationship was used to divide the rate.

The Commission stated in this case, page 26 of 321 ICC, "Because of their long hauls this basis was highly favorable to the defendants—" the defendants were the transcontinental lines "—who also contended that their distance inflation was necessary to compensate them for adverse mountain grades and light density of population and traffic. These views have always been dominant in the thinking of the defendants and are reflected in their contentions here."

The Commission also stated with reference to the Midwestern lines, and I quote:

"At the time when divisional controversies could be settled only by agreement, the defendants were able to prevail on the Midwestern lines to accept their time-honored constructive mileage prorate with the 50 per cent inflation of the defendants' distances."

[fol. 1941] As of now the inflation on the Midwest transcontinental traffic runs as high as 85 per cent in favor of the Transcontinental lines. And this is by reason of the fact that they get the same division to intermediate points as they do to the Pacific Coast terminals. Over-all the inflation was found on a weighted average basis to be 19 per cent in favor of the Transcontinental lines, as against the Midwestern lines.

As to divisions between the East and transcontinental territories, after what the Commission referred to as numerous changes of a minor nature from the divisions which had originally been agreed upon, and which gave the large inflation to the Transcontinental lines, after those changes of a minor nature the lines entered into an agreement in 1922 under which the Eastern lines' shares were increased by what the Commission characterized as a slight amount.

After a long period of negotiation in which the Eastern lines endeavored to get an increase in these divisions, they filed their complaint with the Commission against both the Midwestern lines and the Eastern lines in April of 1954—over ten years ago.

Then the Midwestern lines filed their complaint. And there followed the long proceeding before the Commission and eventually the decision.

[fol. 1942] The Eastern lines attacked only the primary divisions. The rates, let's say, from New York to San Francisco, break over Chicago, Peoria and St. Louis—and some other points, but those principally.

The Eastern lines said we are interested in the division, that primary division. And what the Western lines do west of the Mississippi River or west of Chicago is something that is not our concern. Then the Midwestern lines

brought an issue of the division between their group of lines and the Transcontinental lines in their separate complaint which was heard and disposed of with ours.

Significant to the historical basis of the division, the Commission found—and I quote—

"In 1890 when the division here under consideration had begun to conform to their present pattern the population of the Mountain-Pacific states was 3.102 million, 5 per cent of the total of the entire country. The present population of the same states is 26.9 million, which is 15 per cent of the total.

"The shifts in population and consequent economic changes have also had marked effect on the fortunes of the railroads."

The Commission found that—and I quote again—

[fol. 1943] "The transportation and economic conditions affecting the eastern and western railroads are far different from those which prevailed 75 years ago when this divisional pattern was taking shape."

Now, your Honors, in the proceeding before the Commission, the Transcontinental lines urged—and I quote from their brief—

"* * * The test which the Commission has ruled to be primary is the relative cost of handling the traffic at issue."

They cited several cases in support of that contention, in some of which the Commission said that relative costs of service is a prime factor in determining divisions. And in at least one case where the Commission said that relative costs of service ought to be the factor of primary importance.

All parties used as their cost study, the basis for their cost study, the Commission's Rail Form A. The Transcontinental lines made many adjustments therein, some of which were adopted by the Commission, others of which were rejected. These will be discussed by Mr. Belnap to the extent that they remain in issue.

The Commission examined all of the contentions revolving around the cost studies, and it restated the costs in [fol. 1944] accordance with the decisions which it made with respect to those points.

And before referring to the Commission's restated cost table, I would like to quote to the court one brief but important paragraph in the Commission's supplemental report at page 493.

Judge Crary: 493?

Mr. Kaier: Yes, your Honor.

Judge Crary: Of the Une—

Mr. Kaier: Yes, sir, of 322—

Judge Barnes: Of the March—

Judge Crary: Is it March or the later one?

Mr. Kaier: The later one.

Judge Crary: Yes.

Mr. Kaier: December.

Judge Crary: December.

Mr. Kaier: Yes, sir.

Judge Crary: All right.

Mr. Kaier: This is what the Commission said concerning its restatement—

Judge Barnes: What page are you on now?

Mr. Kaier: 493, your Honor.

The Commission said:

"The restatement of costs contained in our report is based on defendant's costs—" Transcontinental lines— [fol. 1945] "applied to the defendant's traffic study and includes their Rail Form A applications which reflect territorial differences embracing their adjustments for fuel consumption based on grades and curves considered necessary to allow for onerous operating conditions in mountain territory, and their wage, fuel and line haul switching adjustments which they say reflect bridge service.

"Furthermore, the restatement includes all of their other adjustments except the six which were rejected."

Now, I have asked that there be handed to your Honors a table and some charts which show the summary facts that appear in that restatement of costs from the Commission's original report—the one with the red ink on the front, if your Honors please, it is marked Chart Table D. If you will kindly refer to that Table D you will see that on the left side the first two columns of figures show revenues. And then the next two columns of figures show costs and I will not refer to the dollar amounts, but only to the percentage shares.

Let's take the first row of figures across. We find there that on official, on Eastern-Mountain-Pacific traffic, under the Commission's findings—and this revenue figure is based upon the defendant's cost study, Transcontinental lines' [fol. 1946] traffic study, rather,—the Mountain-Pacific railroads got 58.7 per cent of the revenue.

The Eastern railroads got 54.1 per cent of the revenue.

Mr. Cerra: You don't mean Eastern.

Mr. Kaier: Of the costs.

Judge Barnes: Of the costs.

Mr. Kaier: Of the cost, yes, your Honor.

The Eastern lines therefore had 4.6 per cent more of the cost than they did of the revenue.

Judge Barnes: You mean Mountain-Pacific?

Mr. Kaier: Yes, the Mountain-Pacific—the Eastern lines have 4.6 more per cent of the cost than of the revenue.

Judge Barnes: Mountain-Pacific.

Judge Crary: Let's see, the Mountain-Pacific over there on the left—

Mr. Kaier: I am sorry. But I stated it correctly. I gave the wrong figures.

The Mountain-Pacific had 4.6 more per cent of the revenue than of the costs incurred by them.

Judge Barnes: Right.

Mr. Kaier: And on this official Mountain-Pacific traffic the Midwestern lines had 3/10ths of 1 per cent less revenue than costs. And the Eastern railroads had 4.3 per cent [fol. 1947] less revenue than costs.

And then on the Midwest-Mountain-Pacific traffic, the Mountain-Pacific railroads again had 4.4 per cent more revenue than costs, while the Midwestern lines had 4.4 per cent less revenue than costs.

And those figures then are charted on the next two charts. The red, the thin red line across shows what the situation would be if the railroad had the same amount of revenue as the cost incurred. And we said these black blocks show the amount of revenue in excess of the costs which Transcontinental or Mountain-Pacific had. The 3.3 in red is the amount that the Midwestern lines had less than costs, and the 4.3, of course, is the Eastern lines' percentage of—

Judge Barnes: You are arguing to us at this time that something had to be done.

Mr. Kaier: Yes, sir.

Judge Barnes: But as I understand your opponents' arguments, they are not arguing that something had to be done, they are arguing about how it was done.

Mr. Kaier: Well, I think that is true, your Honor. They get to that, but it seems to me that this is a very important point. And it is a very important point also in judging what findings had to be made by the Commission in respect to what it did.

[fol. 1948] Judge Mathes: When you use revenue, you mean freight revenue?

Mr. Kaier: Freight.

Judge Mathes: Freight and passenger?

Mr. Kaier: In this, your Honor—

Judge Mathes: Or all revenue?

Mr. Kaier: In this instance it is only revenue produced by the shipments in—by the divisions of the rates herein involved. Later I shall talk about all revenue from all traffic.

Judge Crary: This is Transcontinental traffic?

Mr. Kaier: This is Transcontinental traffic only.

Judge Crary: Yes, all right.

Judge Barnes: Well, I didn't quite get the answer to the question. Does it—when you say it relates only to freight—

Mr. Kaier: Only to freight.

Judge Barnes: And only to Transcontinental.

Mr. Kaier: Yes, sir.

So taking the test which the Transcontinental lines has urged as being of primary importance, it is clear that the shares of the joint revenue which the Eastern and Midwestern lines are receiving under the present division are far too low.

Now, with respect to over-all earnings and revenue [fol. 1949] needs, the Commission made many findings favorable to the contention of the Eastern and Midwestern lines, some of which I shall later mention. It referred to certain figures, certain rate of return figures as being the most favorable comparison from the standpoint of the Western lines. And it showed those rate of return figures on two bases.

One was rate of return on net investment and, two, rate of return on what it called elements of value. And it said that the elements of value of the two should be given controlling importance.

And we have shown on this other page that I have handed up to the court the rate of return on that latter basis, the one approved by the Commission.

And this, Judge Mathes, is rates of return from over-all operations of freight and passenger.

Judge Mathes: That would not include revenue from oil royalties on land?

Mr. Kaier: No.

Judge Mathes: It would not?

Mr. Kaier: No, it would not, sir.

Judge Mathes: Has the Commission considered that?

Mr. Kaier: The Commission has—

Judge Mathes: Has the Commission considered that statute?

[fol. 1950] Mr. Kaier: The Commission extracted that, they endeavored to extract that and its effect on income tax. It has a marked effect on income tax.

Judge Mathes: In other words, when Section 15(6) of the Act was spoken of there, it means revenue, when the Congress speaks of the amount of revenue required, it is speaking of operating revenue?

[fol. 1951] Mr. Kaier: Correct. So you see from these rates of return that the Commission found controlling that if over the entire postwar period from 1946 to 1958, the Eastern Railroads had a rate of return of 3.4 per cent, the Midwestern 3.49, and the transcontinental 4.64. So that the transcontinental rate of return exceeded that of the East by 36 per cent and that of the Midwest by 33 per cent.

Now, of course, your Honors, when you apply those differences in rate of return to the very large property base, that amounts to a very large amount of money. So even on the basis that the Commission found most favorable to the Western lines, from the standpoint of over-all revenues and over-all expenses of operation, the evidence also pointed strongly in the direction of an increase for the Eastern Roads and also, as the figures show, for the Midwestern Roads.

The Commission also found that of greater significance than these rates of return was the postwar trend of declining freight traffic of the Eastern Railroads and it showed what that trend was. It was looking to the future.

Therefore, we have a situation in which, from the standpoint of relative cost of service, which our friends said should be given prime importance, from the standpoint of over-all revenue returns and from the standpoint of trends, there was indicated a need for an increase in the defendants of the Eastern lines and also of the Midwestern lines.

[fol. 1952] Now, your Honors, the Commission has the power in the public interest to give a carrier or group of carriers more by way of divisions than what might be said to be fair and just as between the parties.

As the Supreme Court said in the Baltimore and Ohio case at 298 U.S., at page 370:

"It is settled that in determining what the division should be the Commission may, in the public interest, take into consideration the financial needs of a weaker road and that it may be given a division larger than justice merely as between the parties would suggest, in order to maintain it in effective operation as part of an adequate transportation system, provided the share left to its connections is adequate to avoid a confiscatory result."

Judge Mathes: That should only be done, I take it, only in the clearest of cases.

Mr. Kaier: At all events, your Honor, it wasn't done here. And I think it is only done in the clearest of cases. It was not done here.

Notwithstanding the Commission's findings that the Eastern lines had a greater revenue need and the Midwestern lines were next, and our friends, the transcontinental lines, were the lowest in that regard, on the basis of rela- [fol. 1953] tive costs of performing the service we got just about what we deserved and the Midwestern lines got less because the Commission left an inflation in the transcontinental lines divisions as against the Midwestern lines, but as compared with us the shares that the Commission allotted were approximately on the basis of relative costs for doing justice merely between the parties.

In a supplemental report the Commission pointed out that fact and it found that on the basis of the divisions which it had prescribed the Eastern lines would receive revenues amounting to a little more than 25.3 per cent of the total revenues and that their costs, relative share of the costs, was 26.1 per cent of the total costs incurred in performing this service.

Judge Mathes: Are you speaking of freight revenues? It would help me very much—

Mr. Kaier: Yes, your Honor.

Judge Mathes: —if you would specify.

Mr. Kaier: This time again it is freight revenue only and only on the East-transcontinental freight business.

Judge Mathes: Is that all the Commission said?

Mr. Kaier: Oh, no. No, indeed. The reason—

Judge Mathes: If it wouldn't break a habit of speech, would you mind specifying what kind of revenue you are talking about, freight revenue only or freight and pas-

[fol. 1954] senger or passenger revenue?

Mr. Kaier: Yes, I will, your Honor.

Generally when I am speaking of anything other than rate of return on investment or net railway operating income it would be freight revenue and particularly freight revenue derived from the traffic between the East and transcontinental territories.

But the point here is that on this traffic, in determining the relative contribution of each group of carriers toward the handling of this traffic, the best way to do it is to find out what cost is incurred by the Eastern lines in transporting it, what cost is incurred by the Midwestern lines, what cost is incurred by the transcontinental lines. And the Commission made that determination.

Now then, in looking at the divisions for the future, it said what it prescribed for the future. It said the revenues of the transcontinental traffic, freight traffic, which the Eastern lines are getting are slightly less than would be warranted on the basis of their share of the cost.

As I have stated with respect to the transcontinental lines, by reason of its consideration of some matters having to do with class rate levels, the Commission left an inflation in the transcontinental lines division, an inflation of ten per cent, as against the transcontinental line—

Mr. Eshelman: Midwestern.

[fol. 1955] Mr. Kaier: Midwestern.

I respectfully submit, therefore, that it would seem quite clear that the Eastern and Midwestern lines have a plain right to the relief that has been granted and that for many years they have been deprived of large sums of money which should rightfully have been theirs. We shall endeavor to meet the attacks made on the Commission's order, at-

tacks which in perhaps most instances are based upon contentions having to do with findings or explanations said to be lacking, rather than upon a demonstration of real grievance of unjust hurt.

I come then to a discussion of Issues 1 to 4, the issues regarding the Commission's alleged lack of necessary findings as to the amount of revenue required and the amount of revenue that would be affected by the Commission's order.

I think I should first state what our position is with respect to those issues and endeavor to defend that position before your Honors.

Our position with respect to the amount of revenue which was affected by the Commission's order is that the Commission was not, under the facts of this case, obliged to find how much was affected by the order. In this case, as I have endeavored to demonstrate and will, I hope, argue at greater length, the Commission did not give the Eastern or Midwestern lines more than justice merely between the [fol. 1956] parties—

Judge Barnes: How did you know that? How can the Commission determine that unless it gets down to dollars and cents?

Mr. Kaier: Your Honor please, as to the Eastern lines it was able to do that on the basis of a traffic study which it referred to as corroborating evidence in its second report. And as to the Midwestern lines it certainly—

Judge Barnes: How can it follow 15(6) and determine the amount of revenue required if it never gets down and determines it is fair and just, and so forth, if it never gets down to the precise figures?

Mr. Kaier: Your Honor please, I am sorry, but what I have said so far went to the second figure, namely, the amount of money being transferred by the Commission's order.

Judge Crary: How could they tell the amount of money transferred from the Commission's order unless they apply the order and determine it in dollars and cents?

Mr. Kaier: They are able to do that with respect to the Eastern-transcontinental traffic on the basis of a traffic study that had been put into evidence by the Midwestern lines. That is the one the Commission said confirmed its decision and showed that the Eastern lines got slightly less, a slightly less per cent of the revenue than of cost. That [fol. 1957] was in the second decision.

Now, as to the Midwestern lines, it was obvious they didn't—

Judge Barnes: It is obvious from what you say that confirms something they had already determined.

Mr. Kaier: They had already determined what the rates should be, your Honor, on various bases, relative costs, relative rates of return, traffic trends, and other things like that.

Judge Barnes: How can get to those figures without determining the dollar amount of revenue required? How can you determine what a fair return on railroad property is unless you get right down to specific dollars and cents?

Mr. Kaier: In this case, your Honor, the important thing was the relative situation between the two groups.

Judge Barnes: That isn't what 15(6) says.

Mr. Kaier: But in its very nature a division controversy is over how much of the revenue received from rates, whether they be high rates, low rates, or what kind of rates, what per cent shall one line or one group receive as against another. And as long, therefore, as the Commission is able to determine that one has a greater need for revenue than the other—

Judge Barnes: How can they determine that without knowing the revenue, without getting it down to dollars and [fol. 1958] cents?

Mr. Kaier: Your Honor, they did, of course, get it down to dollars on the basis of rate of return figures. Rate of return from over-all operations. In other words, the rate of return is what is left over from operating revenues, freight and passenger, after the payment of expenses and taxes.

Then the thing that is left over is net railway operating income and that is related to the property base, so they get rate of return. And the Commission studied that, studied it for the whole postwar period. Compared that with the period from 1923 to '30, which it said was the last normal period before the depression.

It examined many contentions with respect to rate of return, and then it concluded that—well, the figures show that the highest rate of return was the transcontinental in figures, the Midwest next, and then finally that of the transcontinental lines—or the Eastern lines.

[fol. 1959] Judge Mathes: Has the Supreme Court said that Sections 19 and 15(6) can be satisfied by the Commission in any other way than upon an individual carrier basis, that is, considering each carrier, individual carrier?

Mr. Kaier: Yes, yes, I think so, certainly in the New Haven—New England divisions case, and in the Beaumont case.

Now, on this point—

Judge Crary: May I interrupt, counsel, while we are on this subject, if I may, Mr. Kaier?

Mr. Kaier: Yes, your Honor.

Judge Crary: Now you talk about rates of carriers, but that isn't what they are talking about, as I understand it. That isn't the issue that they are raising in 1 to 4.

They say that in order to determine, in order for the Commission to have before it information upon which they can determine whether there is a fair and just division—and we are not trying to determine what is fair at all—but before the Commission can have before it information upon which they can judge whether there is a fair and just rate of return, don't they have to know the amount, the financial effect of these new divisions, and also the amount of the revenue need, and also the effect of the new divisions on the revenue need? Now, isn't that necessary dollar and [fol. 1960] cent-wise?

Mr. Kaier: No, your Honor.

Judge Crary: To determine whether it is fair. You say a certain percentage is fair, but how do you know it is fair unless you know what that percentage will produce? That is the question in my mind.

Mr. Kaier: If your Honor please, if you know it doesn't produce too much in the light of— .

Judge Crary: How do you know whether it produces, if you don't know how much it produces?

Judge Barnes: You are begging the question—

Judge Crary: You are begging the question. How do you know that it is not too much unless you know what it produces, you see, that is the thing that bothers me.

Mr. Kaier: Your Honor, if it doesn't produce more than cost, more than the share of cost for the Eastern lines, then doesn't that show that it is not too much?

Judge Barnes: No, because there are certain factors that Congress has said you have to take into consideration.

Mr. Kaier: All right.

Judge Barnes: The importance of public transportation, among others.

Mr. Kaier: All right.

[fol. 1961] Judge Barnes: It can't be purely dollars.

Mr. Kaier: All right. What is that factor?

Judge Barnes: Well, I am merely pointing out there is something besides dollars. There are other factors besides dollars.

Mr. Kaier: Oh, well, the Commission resolved all those issues, your Honor, like relative efficiency—they said that the lines were operating—that no one group was operating with greater efficiency than the other. And they found nothing in the factor relating to whether one carrier originated traffic and so forth.

It really came down to the two big issues of where the cost issue and the over-all revenue issue—

Judge Barnes: I still haven't heard how you can get to the fairness of the cost issue, or the revenue issue, without getting to the dollars and cents.

Mr. Kaier: Well—

Judge Barnes: Because your answer is that it is fair to have a different rate of return.

Mr. Kaier: No—

Judge Barnes: Because one was inflated.

Mr. Kaier: Your Honor, it—

Judge Barnes: If you are not going to consider the fairness, all we are considering here is, was there sufficient evidence to support the findings of the Commission.

[fol. 1962] Mr. Kaier: I think that is true.

Now, your Honor, let me start with two different—start and discuss this, breaking the thing down into two different things.

First, the amount, let's—this is in the words of the statute—the amount of revenue required by the railroad to pay operating expenses, taxes and a fair return on your property. Now, that has to do with the over-all operation of the railroad, its income from all business, freight and passengers.

Now, the Commission examined the rates of return which showed revenue required to earn those rates of return for a long period of years, 1946 to 1958. It also showed them from 1923 to 1930. And it showed that the trend in this past period had been markedly favorable to the Transcontinental lines. The next in line was the Midwestern and then the Eastern lines.

Now, when the Transcontinental lines submitted findings to the Commission on this rate of return matter, they submitted this finding—and I have handed their findings up to you, this is a duplication, a reproduction of what they had in their briefs, which is in the record in this case, but for convenience I have given it to you.

And will you kindly look at page 175, and it says:

[fol. 1963] "Computation of rates of return.

"The rates of return to which consideration should be given are those experienced in recent periods when comparatively normal conditions prevailed."

So we have from the carriers' own accounts—and they are in evidence—their revenues from operations. We have their operating expenses. We have their taxes. The only missing thing is rate of return. The Transcontinental lines tell us that the rate of return to which consideration should be given are those experienced in recent periods when comparatively normal conditions prevailed. And that completes it.

So the Commission looked at the rates of return for the whole post-war period. And then it examined the rates of return for those years in which the Transcontinental lines said conditions were comparatively normal, namely, 1955, '6 and '7. And the Commission examined those years and said, no, they were not normal. And it excluded those—that is, it wouldn't give controlling weight to them.

Therefore, we have the definition of Transcontinental lines, as supplemented by the Commission's examination, of what the years should be, we have a finding—we have a definition of rate of return to be considered.

So the Commission therefore had in the over-all rates [fol. 1964] of return of the two groups of carriers a demonstration of revenue needs in dollars. And it calls these rates of return for 1955, '6 and '7 the comparison most favorable to the Transcontinental lines. So that it did have this over-all rate of return, over-all measure of revenue needs.

Now, having found that the costs of the Eastern lines and the Midwestern lines, as compared with the Transcontinental lines, were higher, that factor was in favor of the Eastern and Midwestern lines. And then it found that this revenue need factor was in favor of those lines on the basis of the over-all rates of return from all operations.

Now, it then—

Judge Mathes: Is that freight revenue needs or freight and passenger?

Mr. Kaier: Freight and passenger.

Judge Mathes: Or over-all?

Mr. Kaier: Over-all, yes, your Honor.

Now, the Commission at that point was obliged to use its judgment to find out what, in place of the unlawful division, should be prescribed as lawful division.

Judge Mathes: And you are considering costs of freight and passenger?

Mr. Kaier: Considering all evidence of the record, if [fol. 1965] your Honor please.

Judge Mathes: Both freight and passenger?

Mr. Kaier: Both freight and passenger. In this instance it could give what weight, it was for the Commission to determine how much weight could be given to that.

Judge Barnes: Would that mean it could disregard one of the elements?

Mr. Kaier: No, sir, it could not disregard any elements specified by the statute.

Of course, the statute is very broad. It says, "among other things"—and the Commission can take into consideration anything that is relevant.

But the Commission then exercised its judgment as to what the divisions should be. And I came back again to my argument that having done so, and having then demonstrated that what they prescribed did not give the Eastern lines more than their share would have been on the basis of the cost of the Transcontinental freight service, that means that they would not get more than what was fair to them.

And that it must likewise follow that the Midwestern lines didn't get more than what was fair to them, because although their costs were favorable compared with Transcontinental—in other words, they put more by way of cost into it and Transcontinental is getting from the pre- [fol. 1966] scribed division, an inflation of the division.

Judge Mathes: As freight cost?

Mr. Kaier: That latter, your Honor, was Transcontinental—

Judge Mathes: I don't like to be interrupting—

Mr. Kaier: I am sorry, sir.

Judge Mathes: But I must confess I find great difficulty if I don't know what you are talking about, one or both or—

Mr. Kaier: I am sorry, Judge Mathes. That was freight costs, freight in Transcontinental traffic alone.

Now, if your Honors please, I want to point out—

Judge Barnes: Disregarding passengers?

Mr. Kaier: Pardon me?

Judge Barnes: Are you disregarding passenger rates?

Mr. Kaier: In that particular instance.

Judge Barnes: Why do you do that?

Mr. Kaier: No, it didn't disregard passenger rates.

Judge Barnes: Perhaps I didn't understand you.

Mr. Kaier: Then the particular figure that I was talking about there, Judge Barnes,—

Judge Barnes: Is Transcontinental freight.

Mr. Kaier: Transcontinental freight. But it did take [fol. 1967] into consideration over-all returns. But those two, you see, were in favor of the Eastern and Midwestern lines. So you can find that what was fair as between the parties is dependent upon the relative costs of performing the freight service involved in the case. That is what is fair between the parties.

Then the question is, should one group of lines get more because it has over-all revenue needs from freight and passenger greater than the other, so that you have an extraordinary case that in the public interest must get something beyond what was fair. And that the Commission did not give to either of these two groups of lines that got the increase in divisions.

Judge Crary: Here—you said a moment ago, I believe—I may have misunderstood you—that the ICC, the Interstate Commerce Commission did have the revenue needs in dollars. Is that what you said?

Mr. Kaier: Yes, sir, as represented by rates of return, over-all rates of return from over-all operations.

Judge Crary: Well, is that different—you said that they had the revenue needs in dollars. That is what I wrote down.

Mr. Kaier: Yes, sir.

Judge Crary: Then why are you making such an issue of the fact that you say that they don't have to make any [fol. 1968] findings of the revenue needs in dollars? That is one of the big issues here, isn't it? That is issue No. 1. And you can't seem to agree, the sides can't agree that if they already have the needs, if they already have revenue needs in dollars, then there must be something in the record, or a finding to that effect. So what is the big issue about?

Mr. Kaier: My contention is that they do not have to specify the dollar amount of what is being transferred here from one group to the other by the effect of the order.

I say as to revenue needs all they have to do is to find what the relationship is between the several groups of carriers, which one has greater revenue needs, and whether sufficient. But actually that quantitative measurement of revenue needs is the over-all rate of return from all operations, freight and passenger, and that they have that, too.

Judge Crary: Well, is it your position that the Interstate Commerce Commission did not need—not making a finding of it here—but you say that they did not need the amount of the financial effect of the revenue needs—that they did not need the amount of the revenue needs in dollars and cents in their consideration—not making a finding now—but you say they did not need that?

[fol. 1969] Mr. Kaier: I say they did not need that.

Judge Crary: Yes.

Mr. Kaier: I say they did not need that in the relative position of the three groups, yes.

[fol. 1970] Judge Crary: Yes. That is my understanding. I wanted to be sure I understand you.

Mr. Kaier: When I say it is there, your Honor, it is in the rate of return figures and particularly when the rate of return is defined by our friends, the transcontinental lines, in that Finding No. 1 under revenue needs, which I read to you.

Now, I would like to point out this to the court—and I think this is of great importance—the transcontinental lines did not submit to the Commission any findings, any request for findings on revenue needs in the sense of the amount of money required. They didn't ask the Commission to find how much would be transferred by the divisions under issue.

They have that request for findings, which, as you see, numbered over a hundred. They have a special section on revenue needs and there isn't a single finding of the type herein insisted upon that appears in that list.

The transcontinental lines themselves were asking for a ten per cent increase in divisions before the Commission. If they then regarded these findings as necessary under the law, would they not have put a request for findings, for these findings in the list they submitted to the Commission?

Judge Barnes: They may have thought 15(6) required [fol. 1971] such a finding.

Mr. Kaier: Well, if they thought that, your Honor, a fortiori I should think they would put the request in and submit to the Commission a figure as to what that amount was. But they didn't.

Judge Crary: You say their request was first initiated after the March order?

Mr. Kaier: Yes, your Honor, their request was initiated in their petition for reconsideration.

Judge Crary: After the March order?

Mr. Kaier: Their requested findings were, of course, in the original brief, but for findings of the character they are now arguing about under Issues 1 to 4 they first made their appearance on a petition for reconsideration.

Even after the examiners recommended an increase in the divisions for the Eastern and Midwestern lines, your Honors, our friends, the transcontinental lines, asked the Commission in their exceptions to the recommended report to make these findings that had appeared in their brief. They still even at that point didn't ask the Commission to

make the findings that they say now are basic. And Mr. Trienens was asked this morning whether there was evidence submitted by them as to what the revenue required was, and he referred to Exhibit T-275. Well, if your [fol. 1972] Honors please, T-275 isn't anything like the provision of Section 15(6) as to the amount of revenue required to pay operating expenses over-all, freight and passenger, taxes and fair return.

They have here, "Funds Available From Transportation Operations" and "Funds Required For Transportation Capital Expenditures", "Expenditures for Roadway and Equipment", and what they can get by borrowing, what they can get by stocks. But not a rate of return on this exhibit.

I wish your Honors would look at that exhibit that Mr. Trienens says supplies the figure for over-all revenue needs. It is just not there. They have nothing different than what we have, rates of return from over-all operations, freight and passenger.

Now, if your Honors please,—

Judge Mathes: Did you touch upon whether this is fair to Denver & Rio Grande, the Katy and Frisco?

Mr. Kaier: If your Honor please, that has been assigned to Mr. Hamilton.

Judge Mathes: It passed out of my mind.

Mr. Kaier: I am sorry, I am not prepared on that.

Now, I would like to comment some more on the views of the transcontinental lines about the necessity of these findings. They said in their opening brief that these findings are necessary where the Commission predicates its prescription of new divisions on the ground of revenue [fol. 1973] needs, suggesting that it is in that unusual case in which the Commission goes beyond what is fair as between the parties and in the public interest funnels some money from one group of carriers into another to keep them in effective operation.

That is when the transcontinental lines said findings of this character were necessary. For example, on page 27 of their brief they say, and I quote:

"Where, as here, the Commission purports to base its prescription of the divisions at issue on the relative needs of the carriers, the Commission must determine the financial effect of its order, the amount by which the revenues of one group would be increased and the other reduced in order to determine what divisions are lawful."

This was also the theory expressed by those lines in their petition to the ICC for reconsideration. There they said:

"Where the Commission undertakes to base a change in divisions on the ground of revenue needs, it is axiomatic that the Commission must make findings as to the amount of revenue affected",

et cetera.

They went on to say then, and I quote:

"Such findings are essential before the Commission can [fol. 1974] rationally apply a revenue need theory in transferring divisional revenues."

Now, in their reply brief and in their proposed findings and conclusions they have switched on this point. Now they are arguing—and I quote again:

"At least in a case where, as here, the Commission expressly relies on revenue needs as a basis for the new divisions which it prescribed, the findings in question are necessary."

Now, this, of course, is quite a different argument than the argument that was put up in their original brief and the argument which they made to the Commission in their petition for reconsideration and which we answered.

The fact is, of course, that the Commission did not predicate its decision upon the ground of revenue need alone. In its first decision it stated that the Eastern divi-

sions, which it prescribed, "are higher than the present percentages in recognition of the evidence relating to costs and revenue needs previously discussed herein." And in its supplemental report at page 499 it specifically denied that its order was based only on revenue needs.

The Commission's long and detailed analysis of the evidence of the cost of performing the transcontinental freight service and its restatement of the transcontinental lines study of that cost revealed that there was a wide gap [fol. 1975] between revenue received and cost incurred. This obviously was a most important fact.

The Commission stated that relative cost of performing the transcontinental freight service, the service for which these rates that were being divided applied, they say, "furnishes the initial criterion of what is just and fair between the parties."

I have already argued to your Honors that since we incurred, Eastern lines incurred a much greater percentage of cost than the transcontinental, and so did the Midwestern, and since the Commission found that the divisions which it prescribed didn't give us more than our costs and they give the Midwestern lines than their costs, it is obvious that the Commission did not here apply what transcontinental lines call a revenue need theory, and therefore, on the basis of the contention put up to the court in their initial brief, and on the basis of the contentions put up to the Commission where they first mentioned these findings in their petition for reconsideration, the findings on their own theory would not here be required.

Judge Barnes: Do you understand revenue need to refer only to the revenues allocated over and beyond, and regardless of the respective costs?

Mr. Kaier: No, your Honor, I think revenue need is generally thought to mean a need for revenue with refer- [fol. 1976] ence to the over-all operations of the railroads and that that particular phrase generally is thought not to refer only to the revenue received, as against cost incurred in performing the transportation under the rates in issue.

Judge Barnes: I believe you are using it in a term other than in amount of revenue required in 15(6).

Mr. Kaier: No, your Honor, I am using it exactly in that sense.

Judge Barnes: All right.

Mr. Kaier: Now, the transcontinental lines had several subsidiary contentions under this rate of return or over-all revenue needs issue. There was one that they refer to as the basic revenue needs issue presented to the Commission: This was a very interesting contention and I believe showed the extremes to which this group of railroads was forced to go.

The basis for this contention was that the situation of the Eastern and Midwestern lines was static or declining, but that the territory served by the transcontinental lines was growing by such unprecedented proportions that they needed large amounts of capital to meet the demands for their service and that such additional capital was producing no return and that these two other groups of railroads would have to contribute to this need for capital through the divisions.

[fol. 1977] Now, I submit to the court it is a unique and bold contention to say that a group of lines whose situation is static or declining should contribute to a group of lines whose business is on the upsurge by taking lesser divisions in order that the more prosperous group can have a source of investment capital to serve this wonderful business they are experiencing.

We would very, very gladly change places with the transcontinental lines. And the Commission, of course, denied that theory and it didn't do it just upon the basis of passenger deficit, as you were told this morning. It said that it found railroads all over the country had a continuing need for capital expenditures and it couldn't recognize any difference between the transcontinental lines in this regard and the other railroads before it.

Another issue prominently stressed by the transcontinental lines on the issue of revenue needs was the fact that the traffic here involved constitutes a greater proportion of their total freight business than it does of the freight business of the Eastern or Western lines. This also the Commission carefully considered.

And it stated that: "It is apparent that all railroads have a greater dependence now than formerly on long-haul freight traffic."

And that, of course, is what this is. This is the longest. [fol. 1978] And it stated this with regard to the Eastern Roads:

"The Eastern Roads no longer have available to them the profitable volume of freight originated within their own territorial borders which in past years caused them to be regarded as the strongest group of American railroads."

[fol. 1979] "For this reason and others transportation and economic conditions affecting the Eastern and Western railroads are far different from those which prevailed 75 years ago when this divisional structure was taking shape."

The Commission also examined and disallowed the Transcontinental lines' contention that because hold-downs or maximum amounts that freight rates might be increased in this post-war period where there were a series of increases in all freight rates.

Transcontinental lines said that we have more business subject to hold-downs, or lesser increases than the Eastern and Midwestern railroads. And they needed those hold-downs so that the fruit and vegetables and lumber especially could get into the East and the populous markets in the East in competition with fruits and vegetables from Florida and lumber from the South.

The Eastern lines cooperated with them, gave them—concurring in the hold-downs and presenting the matter to the Commission, and took reduced earnings because of the hold-downs, just like the Transcontinental lines.

But they say they have more of that business than the Eastern lines, and that the result was a deterioration of their rate of return. The Commission found that the statistics of record failed to show deterioration of the kind [fol. 1980] referred to.

I submit therefore, if your Honors please, that it is simply impossible to state that the Commission did not give due consideration to all the requirements of Section 15(6) of the Act.

It made a finding on the basis of the revenue need evident after discussing all these contentions, including this basic revenue need contention of greater findings for a possibly improved rate, including the rates of return from over-all operations, including the hold-down matter. It found that the Midwestern lines ranked under the Transcontinental and the Eastern lines ranked down at the bottom, from the standpoint of revenue needs.

Now, although the Commission has had the power to prescribe divisions in the very words which still exist in Section 15(6) since 1920, it has not made the finding here insisted upon, except as it said in some relatively minor cases where it was a simple thing to find out how much money was being affected by their order.

In the Baltimore and Ohio case, which went to the Supreme Court, there was a dispute between the Eastern and Southern lines over the division of rates on citrus fruit from Florida to the north. There were no findings of the character here said to be necessary. The Eastern lines claimed that the Commission's decision was predicated [fol. 1981] solely on the basis of revenue needs, that they were giving them, so to speak, a shot in the arm at the expense of the Eastern lines because they needed the revenue.

And the court said that this was not true, but that apparently the Commission had rested its decision very materially, because it appears to have given much weight to that fact of greater revenue need. And still the Commission's decision was sustained notwithstanding the lack of these findings.

Now, I would like to discuss the decision of the Colorado court that Mr. Trienens has referred to. That case involved the division of joint rates between points on Eastern lines and points on Transcontinental lines in the Midwest.

A basis of divisions referred to as the 28-277 scale was in effect between points on the Eastern lines and points in the eastern part of Midwest territory on some other railroads. It was there as to some of those Midwestern railroads by prescription of the Commission, and as to the rest of them by agreement between the Eastern lines and those roads.

The construction of that scale was such that whichever line had the short haul, as compared with the other line, got favorable treatment. It got the greater amount of money relatively.

[fol. 1982] Now, in the case before the Commission the Transcontinental lines offered evidence to show that whereas the lines that had agreed with the Eastern lines on this scale, and the ones which had it by the Commission's prescription, whereas they were short haul carriers vis-a-vis the Eastern lines, the Transcontinental lines would be long haul carriers, so that the scale would have precisely the opposite effect applying it with the Eastern and Transcontinental lines than it had when it was applied between the Eastern lines and the other Midwestern lines as to which it was in effect.

Notwithstanding this clear issue as to the difference in conditions between the lines on which the scale applied and the Transcontinental lines, it was prescribed by the Commission. The Commission said that uniformity would be attained by its prescription, and the fact that it is satisfactory to the Midwestern lines that have it and that handle the greater part of the traffic to this territory is a significant and important circumstance.

The Commission made no finding as to the relative cost of handling the freight service that was involved under the rates being divided in that case. No cost findings what-

ever. It predicated its decision to give this scale to the Transcontinental lines on the fact that other lines had it in that territory.

[fol. 1983] And the court said in Denver, the Colorado court said with respect to the excluded evidence, although this evidence would have gone to the very heart of the issue as to whether the voluntary act of the Midwestern lines in entering into the agreement was conduct of lines in like situations, the Commission excluded the exhibit on the ground of irrelevancy.

And the court said also, the Commission's grouping of the Western and Midwestern lines was invalid since no similarity of circumstances was demonstrated. In view of the fact that the evidence tends rather more to establish the fact of unlike circumstances than the fact of like circumstances, the Commission erred in finding that the agreement between the Eastern and the original Midwestern lines was significant and important.

Having made that finding, having found that there was not the comparability of conditions which would allow the Commission to prescribe that scale of rate for the Transcontinental division simply because it existed as to the divisions of the other—of the Midwestern lines, having made that, there was no longer any basis for the Commission's decision in that case, because its decision was predicated on the fact that the scale existed between the Eastern lines and the Midwestern lines.

The court examined the Commission's decision and it [fol. 1984] found no other ground upon which the Commission had predicated its action, except, it said, possibly as to revenue needs. But it said that the court gave consideration to that factor only from the standpoint of the Eastern lines. It said, the court said, at page 606, "From the general tone of the Commission's report it cannot be concluded that the Commission did consider substantial evidence of revenue needs of all the parties either as groups or as individuals for the report shows only a consideration of the revenue needs of the Eastern lines."

The court's conclusion that some reason to support the prescription of the divisions which were prescribed, namely, the 28-277 scale—its conclusion that some reason was necessary certainly cannot sustain the contention of the plaintiffs in this case where the Commission assigned relative costs, rates of return, relative revenue needs as shown by all these facts.

I submit therefore that that case is by no means controlling in the present case.

If it please the court, the Eastern lines and the Midwestern lines have been deprived of the divisions which are not even defended here as being lawful—they have been deprived of lawful divisions for more than ten years. There is no contention before the court—I have heard no contention today that the basis of divisions which the Com- [fol. 1985] mission overturned is a lawful basis. You didn't hear Mr. Trienens defend those existing divisions. They want you, because of editorial defects, to send this case back to the Commission so that they can hang on to those unlawful divisions for another indefinite period of time.

Now, if your Honors please, these divisions which the Commission has prescribed in this case are not an immutable thing that have to last for all time. The Interstate Commerce Commission has the power specifically under the Act to amend its order.

Judge Barnes: Retroactively or prospectively?

Mr. Kaier: Prospectively.

Judge Barnes: What is going to happen to Katy and San Francisco?

Mr. Kaier: Well, if your Honor please, I am going to have to leave Katy and San Francisco to one of my colleagues.

But in that connection, your Honor, don't forget that we were without these divisions, we were without—

Judge Barnes: Not without 95 per cent of your income.

Mr. Kaier: Well, I am not so sure that some roads weren't. What about those roads that were operating at a

deficit in the East? Wouldn't they have liked to have had this money all those years.

[fol. 1986] Judge Crary: Isn't it a fact that there is a remedy in the fact that somebody can always petition the Interstate Commerce Commission?

Mr. Kaier: It is indeed a fact—

Judge Crary: I say it is a fact, but is that fact something that we should consider in determining whether the Commission has made a fair and just division? Is the fact that somebody tomorrow can come back and argue about it, is that to be determined, I mean is that to be considered at this time?

Mr. Kaier: No, I don't think so, your Honor. I think that the Commission's decision has to stand on the Commission's report and on the record here.

Judge Crary: All right.

Mr. Kaier: However, I think that it is, in connection with your consideration of this case, I do think that you should have in mind that the Commission can change this, and that if we had to wait all these years for these lawful divisions, that it isn't too much to ask the Transcontinental lines also to have a reasonable test period and see how they work out.

And they can go back, if they are going to have any drastic effect on them, they can go back and get them changed.

They say that it is impossible to estimate the revenue [fol. 1987] effect. They say it can't be done. Well, all right, then why not see how they make out—they have been in effect, you know, now—they haven't been in effect, your Honors have prevented them from going into effect, but the Transcontinental lines have been, pursuant to an order of the Commission, keeping their accounts on the basis of the new division. And effective, I think, July 1st, 1963 their income accounts have reflected the new division.

And while, of course, they submit those reports to the Commission, they are published in the newspaper, every-

body knows what they are, and we know what they are and they know what they are, and as far as we are concerned, your Honors, if you want to know what they are, we have no objection to your knowing what they are, provided our friends don't object. We would be happy to have you see those reports. And I have them here. I have a tabulation showing their rate of return for the full year between July 1, 1963, and June 30, 1964, as reported by them to the ICC and then drawn off from those reports by the Association of American Railroads.

Well, if your Honors please, I think I have to say something now about the passenger deficit matter. The basic contention here is that the Commission decided the revenue needs issue solely with reference to earnings from freight service, over-all freight service. This statement [fol. 1988] was made time and again in the briefs of the Transcontinental lines.

In fact, they said it so many times, that the Government collected in an appendix to this case to show all such references.

Our answer to that is that it is simply not true. The Commission's report, as any reading thereof will show, did not reach its decision as to revenue needs only on the basis of freight earnings.

[fol. 1989] The Commission tells us also in its supplemental report that it took into consideration earnings from all services, freight and passenger.

Now, if your Honors please, it is plain that these passenger deficit figures and that freight earnings, earnings from over-all freight operations, revenues and expenses from freight had some pertinence in the proceedings before the Commission.

Our friends, the transcontinental lines themselves offered in evidence revenues from all freight services and expenses from all freight services. They are shown among other places in the exhibit of Mr. Bearss. I think it is Exhibit 276. They are shown also as to the Southern Pacific in the exhibit of Mr. Russell, president of that company.

Certainly they must have had some pertinence or they wouldn't have put them in.

Our friends have suggested that it was necessary rebuttal evidence to some evidence that had been put in by a Midwestern line. Why then did they put it in for the Eastern Railroads? Why did Mr. Russell put it in for the Southern Pacific? That had no reference to the Eastern lines.

The Commission specified the ways in which it had used this evidence. It examined the contention that because of their hold-downs their rate of return had deteriorated. In order to determine that it was necessary to look at the [fol. 1990] results of their operation from the over-all freight service, and the Commission, to do that, had to extract the passenger figures. It did it. It used it also to determine whether '55, '56 and '57 were typical years or representative years for measuring the over-all rate of return.

It looked in that connection again at the passenger deficits of the transcontinental lines and said that in those years they were higher than any of the other years. That was one of the reasons it gave for not accepting those as typical. There were several other situations like that in which it used the passenger deficit evidence to test contentions made by the Transcontinental lines.

Now, it is true in several passages of its report the Commission refers to the railroads in their capacity as freight carriers, and it refers to freight earnings from time to time.

Here, for example, is a sentence from the Commission's report of which much is made by the transcontinental lines in their reply brief. The Commission said:

"The evidence concerning financial and traffic statistics also disclosed that the trend in the earning power of the Eastern Railroads as freight carriers since the end of World War II has been much less favorable than that of the Western lines."

[fol. 1991] Now, to examine the trends of the railroads from the standpoint of their performance as freight carriers, when inquiring into their earning power, is certainly the most rational thing in the world to do because it is in the freight service that the potential for earnings lies. Passenger service is operated as a deficit, so if there is a potential for earnings the freight service must be examined.

It is quite logical, therefore, for the Commission to examine this fundamental thing upon which the railroads rely and see what the results of operations were from that.

Now, I submit, therefore, that it was logical for the Commission to do what it did with this freight earning evidence, evidence submitted by the transcontinental lines, among others, and I submit their report shows in a rational way what use it made of that evidence.

The transcontinental lines contend also, in substance, that unless the Commission makes an inquiry to determine how much of the allocated cost would be saved if passenger operations were discontinued and only freight operations continued, they said an inquiry must be made before the Commission can use freight expenses as derived under its formula for determining the cost of hauling all freight.

Well now, your Honors, again that is a very strange contention for them to make when they themselves put into [fol. 1992] evidence the expenses attributable to all freight traffic, as derived from the ICC's formula for determining those expenses. And again the study of the cost of performing the transcontinental freight service of those lines, Eastern lines and the Midwestern lines, were all predicated upon as the very basis, starting point, was the freight expenses derived from the Commission's formula for separation of freight and passenger services.

Also, as we pointed out in our brief, the Commission has conducted two fairly recent investigations into these rules for separation of freight and passenger expenses, and it was urged by the Association of American Railroads on behalf of all of us that those rules do produce figures that are reliable for the purposes used, and that they are useful.

The Commission agreed and one of the purposes it said was in looking at trends, and also for the purpose of determining costs in rate cases.

So it is really an extreme contention, it seems to me, for them to say that the Commission could not give the consideration which it did give to those freight expenses without making an investigation to determine how much would be saved if the passenger business were stopped and only freight conducted.

Judge Mathes: Does the record show relative to pas-
[fol. 1993] senger and freight revenues for the Northwestern, E & EM and Pennsylvania, for example?

Mr. Kaier: Apparently it does for the principal roads, your Honor. I think those you named would be included. It would show revenues. I doubt that it would show passenger expenses.

Judges Mathes: Doesn't the formula contemplate an allocation of cost between freight and passenger services?

Mr. Kaier: Yes, it does, your Honor. Of course, there isn't any problem about the revenue. You don't have to have the formula for those. The formula does and is designed to make an allocation of expenses as between freight and passenger.

Now, finally our friends say that they have been deprived of a fair hearing with respect to this passenger deficit matter and the Commission's use of it.

The origin of the claim of denial of hearing lies in the exceptions of the transcontinental lines to the proposed report.

They said that the examiner had predicated his recommendations on a charge of excessive passenger deficit, reflecting inefficiencies of operations and based on evidence outside the record.

And they said if the Commission is to pursue this charge, then there must be a hearing. And I would like to argue at
[fol. 1994] length about this, but I see I am trespassing upon my colleagues' time and I will say simply this:

The Commission didn't pursue the examiner's charge. Transcontinental lines said the examiner has imaginatively created a fund of $70,000,000.00 from which he says—and that is by reduction of passenger deficits—and from that the transcontinental lines can pay the divisional money over to the other groups.

The Commission didn't adopt any such theory as that and, therefore, the condition upon which the transcontinental lines say they wanted to offer this evidence never came into being. The Commission simply didn't adopt the examiner's charge and, moreover, it did not act on evidence outside the record. Everything it said about passenger deficit was in the record.

Thank you.

ARGUMENT ON BEHALF OF INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY CO., ET AL.

Mr. Belnap: Your Honors please, I am Nuel Belnap. I was one of the counsel who assisted in presenting the evidence for the Midwestern lines in the case before the Commission. My argument is going to be confined to the cost questions in this case. What I say is on behalf of all parties on the defendants' side of the case.

[fol. 1995] I will attempt to confine my discussion to the particular cost question to which Mr. Trienens addressed himself, though that may be somewhat difficult. He did it broadly in some respects. I trust you will bear with me if I go too much in detail where he sort of gave it a broad brush.

Before I start may I inquire of your Honors the time at which the court expects to rise at the end of the day? I say this as it would be more convenient to me if I knew that so that of the many subjects I have to cover I can tailor it to end one of them at the time you rise.

Judge Barnes: We don't know what time we will rise. It will depend on when you get through. We are not going to shorten you on the time.

Mr. Belnap: I will attempt to conclude my argument then, your Honors, within certainly a reasonable time if you would like to hear it all today.

Before I start to discuss any of the particular issues, I would like to put these cost questions which are raised in this court proceeding in some sort of context so you can see how they relate to the whole matter.

In the Commission proceedings I think—I am conservative when I say that over one-half of the entire record, exhibits, transcript, was devoted to cost questions and matters related thereto.

[fol. 1996] The Commission, in the course of its settlement of the case, coming to its final conclusions, had to settle literally hundreds and hundreds and hundreds of questions as to the cost factors which should be used in building right from the ground up until it came to its final cost findings.

In its rulings sometimes it ruled in favor of the Midwestern lines, sometimes in favor of the transcontinental lines, sometimes in favor of the Eastern lines. But out of the weighing of a tremendous number of separate pieces of cost evidence the Commission came to its basic cost finding, which is on page 47 and a few pages thereafter of its first report, the high point of that finding being the dollar amount in total and by groups of the out-of-pocket costs incurred by these carriers in producing from the involved traffic a given amount of revenue and the revenue was found by the Commission also in total and by groups.

When it comes to this case, the transcontinental lines have selected a very limited number, ten, if you count them individually, but much less than that in concept of the cost questions ruled upon by the Commission, as to which they are now endeavoring to contend that those questions involved a question of law which should be reviewed by this court and that this court should find that the Commission [fol. 1997] erred in its understanding of the law, and for that reason its report should be set aside.

[fol. 1998] Those questions were apparently selected, as I shall point out in one or two instances, without any regard

to the relative significance of the impact of the questions on the Commission's ultimate decision.

Now I would like to make plain, on behalf of all of the defendants right at the outset, your Honors, that there isn't the slightest effort on our part to say that Section 8(B) of the Administrative Procedure Act does not apply to divisions cases. Of course, it applies. It applies with full force and effect. It requires that when the Commission enters a basic and essential finding on which it predicates a conclusion, the Commission must—at the risk of having its order set aside—state the basis or the reason for that essential finding.

Our position here is that the Commission did so in every respect in this case, and it went beyond that in a great many instances when dealing with evidentiary matters, way below the level of essential or basic findings, way below that level. It spelled out pretty carefully its reasons for declining to give weight to this piece of evidence, and to give weight to another piece of evidence.

And while I am speaking about the position of the Commission, I heard Mr. Trienens this morning try to give you the impression that the Commission opposed the Administrative Procedure Act because of its requirement as to [fol. 1999] findings. I urge your Honors to review yourselves the legislative history of the Commission's appearance before the Congressional Committee on that Act. You will find they opposed it. But their opposition was never predicated on the requirement that they give reasons or bases for findings on which they supported conclusions.

In fact, they took the position that they did that so well under their rules of practice there was no need for an act. They opposed it on certain other reasons which have no relation to any question involved in this case. And I assert to your Honors that if you read that legislative history you must come to that conclusion. But don't let anybody take words out of context, tell your Honors that the Commission opposed that Act because it required them to make

findings and to give reasons and bases. That is not the truth.

The first issue to which Mr. Trienens addressed himself is Issue No. 20. Under that issue the Transcontinental lines would make a material issue out of the question of the form in which costs may be used by the Commission in comparison with revenues in coming to a conclusion as to whether the existing divisions produce revenues fairly related to the costs.

This is an invalid claim of theirs primarily because the election as to the form in which this comparison is to be [fol. 2000] made is not a material issue. It is on the evidentiary level.

And if your Honors please, will you please trace with me the order of the thinking in this report. We start at the end. The Commission concluded that the existing divisions were unreasonable, inequitable. The Commission concluded—and these were two ultimate conclusions—that a reasonable basis for division would be thus and so. It is all spelled out in the appendix.

Now, the basic and essential findings for those conclusions are summarized in our proposed findings of fact on page 79, beginning at line 11. And among the basic and essential findings to that conclusion, to those ultimate conclusions from the standpoint of the costs—although costs must be recognized as only part of the case—are these: One of the Commission's essential findings were the Transcontinental lines divisions of the transcontinental rates are unjustifiably favorable to them.

Another essential finding is that the primary Midwestern divisions as a whole are too low.

Another essential finding the revenues of the Eastern and Midwestern lines derived from the present divisions are too low.

Another, in the light of the evidence the Eastern carriers divisions should be increased also. The divisions

[fol. 2001] prescribed for the Eastern lines are not in excess of the fair and reasonable level also.

That divisional factors made 10 per cent higher in Mountain-Pacific than in Midwestern territories give fair recognition to evidence.

We have a factual—talking only as to Midwestern lines—we have a factual dispute with the Commission about that. We think they gave more than fair recognition to the evidence. But for the purpose of this case that is recognized by us as an essential finding, a basic finding.

And every one of those basic or essential findings is in turn supported by subsidiary findings as to costs. And the bases for those cost findings, the basis within the meaning, as I understand of Section 8(B) of the Administrative Procedure Act, are the amounts by railroad groups which the Commission found for the revenues involved from the particular traffic in issue, and the amount of the costs associated therewith—

Judge Barnes: Why do you say groups?

Mr. Belnap: Because the case was tried on that basis. Not only by the—

Judge Barnes: That isn't what 15(6) says, is it?

Mr. Belnap: I don't think that 15(6) tells us how to present the cost evidence, your Honor. I think the cost evidence in this whole case, it was tried by every—it has [fol. 2002] been tried by every divisions case I have ever read, a big territorial case, on the basis of combining for the lines on one side and the dividing line costs of revenues and combining on the other side the costs and revenues.

Judge Barnes: Well, then, how did you ever get down to the last reference in 15(6) where you determine whether any particular participating carrier shall be entitled to a greater or lesser proportion than another carrier? Wouldn't that be evidence of that?

Mr. Belnap: You have, if any particular participating carrier comes forward with evidence and says, I should be

treated unusually—ordinarily we find no such carrier in these large division cases.

While they will have varying costs, have varying densities of traffic, they join, the carriers themselves join each other in presenting the evidence on a group basis. The Commission accepts it, makes its determination on the group basis.

I am dealing only with the costs, sir, not with the propriety of the group basis as against the individual. And I should not beg off from trying to answer your question, but, honestly—

Judge Barnes: That is the way it is always tried?

Mr. Belnap: They did it that way in this case. The [fol. 2003] Transcontinentals came along in this case the same way. They didn't give you the Amador Central separately from the Santa Fe Railroad. They put them all in one common pot.

And the Commission used these to make—of course the divisions are by groups also, sir. There is a common division, take the Eastern lines as the simplest example. There is a division of the rate to San Francisco for the services between New York and Chicago which is the same on all traffic, heavy or light traffic, whether it is high rated, low rated, high cost, or low cost.

That same division applies whether the short line of the Pennsylvania Railroad handles the traffic or whether it goes around over the B & O. They are all part of the common pot. The revenues are treated together and the costs are treated together when we come to a presentation in this case. To the best of my knowledge there was no party in this case attempted at any time in their cost presentation to say, I should be specially favored, or my situation should be looked at separately and independently from the situations of others.

So at the conclusion of this series of decisional steps the Commission was able to, and did determine that the

existing divisions unduly favored the Transcontinental lines, that it was to the detriment of the Midwestern and [fol. 2004] Eastern lines and there should be changes made.

And I would like to illustrate, in addition to the one Mr. Kaier illustrated in his argument, the types of comparisons that the Commission predicated on aggregate costs versus effective revenue.

I think there has been handed to you two sheets, one is called Table A and the other is Chart A.

Judge Crary: Chart B, is that one of them?

Mr. Belnap: Chart A, sir. It is Table A and Chart A. They are pinned together, sir.

Judge Crary: Yes.

Mr. Belnap: Now, Mr. Kaier showed you a comparison in which the yardsticks used to measure equities were, how does your percentage points of revenue compare with your percentage points of cost?

And we showed the Transcontinental lines revenues exceeding, in percentage points, exceeding the percentage points of their costs, to the detriment of the Eastern and Midwestern lines.

Now, this is another type of finding the Commission made based on the comparison. And it treats each group separately to measure the revenues for that group against the costs of that group to express the ratio of revenue to the out-of-pocket costs. It relates entirely, sir, to the traffic at issue. This is akin to an operating ratio comparison. [fol. 2005] That is a traditional, well known and generally used concept for comparing among railroads their profitability experience, how do their revenues compare with what they spend to produce the revenues. And that is what this is.

Judge Barnes: What traffic is this?

Mr. Belnap: This is the transcontinental traffic at issue.

Judge Barnes: Transcontinental freight?

Mr. Belnap: The transcontinental freight traffic at issue.

This takes out for each of these groups, out of the total traffic, that portion of the traffic which is involved in this

case. And it sets forth—and this is the Commission's finding—the Commission took that apart from the whole traffic for each group. And then it stated in effect what the revenues were earned per dollar of out-of-pocket cost expenditures.

And you will observe that in the case of involved transcontinental traffic the Transcontinental railroads took home $1.57 for every dollar that they laid out in the way of out-of-pocket costs in handling the traffic.

Judge Barnes: When you refer to the present divisions, was that present provisions at the time before the ICC Act?

[fol. 2006] Mr. Belnap: And they are still in effect, sir, by reason of the injunction of this court that we are referring to these as present divisions.

Judge Barnes: I see. All right.

Mr. Belnap: The Midwestern revenues under present divisions, they are able to take home $1.43 for every dollar of out-of-pocket costs expended on the official traffic.

And the Eastern lines, they can get home with only $1.22 of every dollar, every time they spend a dollar to carry traffic.

In the case of the Midwestern transcontinental traffic, which is separately a very, very large block of the traffic involved in this case, the Transcontinental lines take home $1.71 for every dollar of out-of-pocket costs. Whereas the Midwestern lines take home only $1.39.

Now, the charge of error which Mr. Trienens has presented to you in connection with comparisons like this is that the Commission didn't verbalize its reasons for using aggregate costs in comparison with aggregate revenues.

[fol. 2007] I said that this decision, to use this type of comparison, is not, of course, at the level of an essential or basic finding. It is a way down level in the case and is at the evidentiary level. It is really a basis for a basic finding. But I don't believe that the Administrative Procedure Act requires you to keep on going, going down, and

every time you get a basis, then you still have to give another basis for a basis. You will appreciate from the form in which the error is alleged, the issues stated and the argument made, that there is no claim in connection with this Issue No. 20, that there is any lack of supporting evidence for this comparison I have just shown you or the comparisons Mr. Kaier presented in his color charts.

There is no claim that these comparisons are not highly relevant to the issue. No one argues this is an irrational, a crazy comparison. It is obviously highly rational.

Judge Crary: The result of that is there is a need for a change of rates, a change of divisions.

Mr. Belnap: That is so, sir.

Judge Crary: Let's assume that is established.

Mr. Belnap: If that is established, I pass on from Issue 20, because the claim of error is that Commission's order could be sent back because it didn't verbalize its reason for making this comparison.

[fol. 2008] Judge Barnes: As I understand it, it is because it used aggregate figures instead of individual figures.

Mr. Belnap: Yes, that is correct, and these are aggregate figures on these charts.

Judge Crary: These charts show very clearly what happened under what you call the present divisions, and rightfully so, because you say they are still in existence.

But where are the charts that show dollar and centswise that you have here the effect of the new divisions?

Mr. Belnap: That isn't under Issue 20, your Honor. Issue 20 is a simple question, is the Commission required—

Judge Crary: You are undoubtedly right on that.

Mr. Belnap: Let me go on to talk about this aggregate and I will skip a thing or two, if I may, and go to the other charts I have laid before you, D and E. They look very much like the charts Mr. Kaier handed up to you, except they have some different figures on them.

In the case of a test of the profit position of a railroad on a particular traffic or as to all its traffic by the operat-

ing ratio method, I can't conceive how you could ever use constructive revenues related to shipment-by-shipment costs and make any comparison that would be meaningful. You can compare revenues with revenues, but you aren't telling what the profit is.

The comparisons I have shown you on the charts I handed [fol. 2009] up deal with the profits. Those can only be done in the traditional method used by railroad analysts all the time, what is the operating ratio for the traffic?

Judge Barnes: Of course, suppose that one railroad for one reason or another—suppose a railroad running from Detroit has so much freight, automobiles, that it runs at a very profitable figure, and you have two other railroads in other parts of that same area, one group, that do not run at a profitable figure, they are losing money, would your aggregate of one group as compared to the aggregate in another be sure of carrying the division that should be coming from it?

Mr. Belnap: Of course, this case was tried wholly on that basis, by all groups. I say it in this sense: It is recognized there are some railroads that make more money than others. It is recognized that some railroads are maybe right on the verge of going into receivership, but they are plugging along with everybody else. The competitive situation is such that—

Judge Barnes: My question goes to what is the effect of such an order as this.

Mr. Belnap: I appreciate that, your Honors, but I point out the practicalities of the situation that induces the trial of these cases on a group basis. You can have a railroad that needs the money and if that railroad had the bigger [fol. 2010] division it would be exceedingly disruptive in the competitive situation as between the railroads.

Let's take it east of Chicago. I don't know—let's assume it is Erie. So they ought to have a bigger division. What Western line is ever going to give the Erie any through-traffic at a common rate if it gets a bigger division? I mean that is a practical situation, your Honors, which

makes it essential from the railroads' standpoint to try these cases on a group basis.

I have never understood this aggregate cost shipment-by-shipment cost proportion of having any reality in the making of any divisions. Certainly there are no divisions ever made that way; none of them, when they apply from a gateway to a gateway.

If they were, I just want to show you because the transcontinental lines in their brief made much of the point and Mr. Trienens repeated it in argument. They say this aggregate cost method accounts for a full 1.1 per cent of the difference between the costs that our cost study assigned to this traffic on a portion of the Eastern lines and what the Commission assigns to it on the aggregate after it restated our costs, and I accept that 1.1 as true.

It can be measured, as we have measured in one of our proposed findings and as Mr. Trienens has measured in his brief, by comparing the group percentage, when the [fol. 2011] revenues are constructed shipment by shipment on a cost basis, cost proportions, when those revenues, which are not costs at all, but you get a percentage out of them, when those per cents of those constructive revenues are compared with the per cents when you put all the costs together for the group.

It is true that Eastern lines come up with a 1.1 better showing under the Commission's aggregate cost method than under this constructive revenue method which the transcontinental lines advocated.

But, your Honors please, they don't show you the rest of the picture. You can't move one of these dominoes in one direction unless you balance it by moving another domino in the opposite direction.

Chart D shows, it is a companion chart to Mr. Kaier's chart B. It shows you what would be the difference—it is only the difference—it shows you what would be the difference with the same moneys if the comparison were made on a shipment-by-shipment cost proportion basis as against the aggregate cost basis. I misspoke myself. When

I say the same money, I can't speak of the Commission's restated costs because we don't have the comparisons.

We have to go back, as Mr. Trienens did in his brief,—we don't quarrel with that at all—go back and if you took the cost figures before the Commission restated it, how [fol. 2012] the percentage proportions differed, depending on whether you get it on the basis of aggregate costs or the basis of constructive revenues, and that is determinable by looking at the Commission's table on 47 and then one of the transcontinental lines' brief, T. 632, page 20, in which Mr. Trienens give you a citation. So that is what I am dealing with.

The Eastern lines—of course, he said so and it is true, that under the transcontinental lines method their deficit, if you may call these red figures a deficit, are 1.1 per cent less. So they only become 3.2 now. That is all. Their revenue points fail to equal their cost points.

But where does that 1.1 go? I will tell you where a lot of it goes. .7 comes in as an increase in the minus figure for the Midwestern lines. In other words, the Midwestern lines, under the transcontinentals' method, show a worse position than under the aggregate cost method of the Commission.

The transcontinental lines themselves, they show if you use their method then their excess of percentage point would be only .4, would be .4 less than under the method used by the Commission.

Now, if you look at Chart E, and that corresponds to Mr. Kaier's second chart, that deals with the Midwestern traffic, Midwestern-transcontinental. Now, in that situation [fol. 2013] the transcontinental lines would make a poor showing and it would be a much better showing for the Midwestern lines, in their trying to get some relief in this case, if we were to use the transcontinental lines method than when we use the aggregate cost method of the Commission.

I don't put those out, your Honors, on the theory I am arguing the application of the rule of prejudicial error as

to this issue. I am not asking you to apply the rule of prejudicial error to this issue because these defendants are unwilling to even assume, even arguendo, there is anything wrong by reason of the Commission's use of aggregate costs at the step of the decisional process where it made that use. And we think it may be of some interest to you to take his first cost point on which Mr. Trienens spent so much time at the opening of his argument—take his very first cost point and show you how little is really involved from the standpoint of the plaintiff's case.

That takes me a little way from my manuscript but there is another point in connection with that I would like to mention. Mr. Trienens told you that these Midwestern-Eastern lines went for the averages because that helped them. They went for the group averages because that was better for them. I don't think that is the explanation at all, actually, why they went there. I don't think we knew any better. Rail Form A—I use that in a facetious sense, [fol. 2014] but let me say it this way: Rail Form A is a method of cost finding which the Commission used and all these railroads on both sides of this room have used over a great many years, without any adjustment whatsoever, to determine relative cost for large blocks of traffic. We are accustomed to using Rail Form A cost.

The Eastern lines open up and put in the Rail Form A cost; the Midwestern lines put in Rail Form A cost as applied to a sample of traffic.

I am quite sure that neither of those groups have the slightest idea of what it was going to show until the application to the individual sample shipments was all added together and the per cent computed. The transcontinental lines looked that situation over and it looked pretty bad for them, so they undertook, so they tell you, to find the cost of the transcontinental traffic and not this average cost by railroad groups, because they think that principle is good.

Apparently they didn't do it because they thought it would better their position, but it was a matter of prin-

ciple with them. The odd part of it is they never made an adjustment in Rail Form A or made a departure from it that I can recall now which didn't better their relative position as against Rail Form A.

The parties and the Commission were concerned in this [fol. 2015] case with cost relation. It wasn't what the costs were so much but how are the costs related. That is the reason for great emphasis for putting costs on the comparable basis so you can't chisel a bit by the way you put them together. Do them equally for everybody; same method.

Judge Crary: You know the difference between the use of this Rail Form A with the adjustments by the Western Roads and the Rail Form A by the Eastern? What was the net difference?

Mr. Belnap: I can tell you for the Midwestern because of the Midwestern cost people were the people who finally went to the trouble of appraising every departure.

Judge Crary: Was it relatively the same or substantially different?

Mr. Belnap: I will refer to the Commission's report. It is on page 47, the figures, your Honor, and the differences percentagewise are in a small table at the bottom of 49. There is Rail Form A. That is applied to the transcontinental lines traffic study without any adjustment or departure.

The column headed "Restatement" on page 47 and on page 49 is "Restated Defendants' Cost Study" are the Commission's figures after they accepted the cost study in large part, that part necessary to show differences in terrain and the differences between bridge service and all [fol. 2016] these other things the transcontinental lines talk about, and the average of all traffic services.

That restatement is by the Commission, at Column 3, and Column 2 is what the defendants claim, and we ascertained those costs, we unraveled them with a computer program of our own because they never put those costs

in the record on a group basis, but there they are. The Commission has them on page 47.

If you look over on page 49 you will find that as far as the costs themselves are concerned, in the case of the official Mountain-Pacific traffic, the Commission's restatement gives the Mountain-Pacific lines a percentage proportion which is 1.2 per cent greater than Rail Form A would give them. It gives the Midwest .6 less, the official lines .6 less on the transcontinental traffic, moving between official and transcontinental territories.

Then if you take the Midwest-Mountain-Pacific traffic, that traffic which moves from Chicago and St. Louis and that area, between that area and the Pacific Coast, the difference between Rail Form A and the Commission's restatement of the defendants' cost study and all that great variety of adjustments which they make, which the Commission accepted, there is only .2.

Judge Crary: You say the defendants. You are talking about the plaintiffs in this case.

[fol. 2017] Mr. Belnap: That is right.

Judge Crary: Just so we understand each other.

Mr. Belnap: I have been warned about that.

Judge Crary: They were the defendants in your case before.

Mr. Belnap: That is right.

I want to call your attention to the next page, over on 50, what the Commission said about this comparison and this table at page 49.

[fol. 2018] If your Honors please, I think it is worth reading the two or three sentences. "The significance of column 6—and that is the column I have been reading these differences from—is the smallness in the difference between the two costs shown, one based on a study made in great detail of the particular services rendered in this traffic, and the other a straight Rail Form A application.

"One substantiates the other and supports the view that for a large and varied body of traffic, as here at issue,

territorial average costs will be the substantial equivalent, not specific costs."

And that really is the basic finding which supports a great deal of the contrary rulings against the Transcontinental lines which the Commission made. It takes the view upon long experience in dealing with costs, as well as the particular evidence in this case, that the words "territorial averages" actually end up with being right near the specific costs.

But I started out to tell your Honors that Mr. Trienens said to you that the Eastern and Midwestern lines went for the averages because they bettered their position and they, as a matter of principle, sought to get the actual costs. And he used "actual" a great deal in his opening brief. I don't think you find it in his reply brief, but he did in his opening brief. They attempted to get the costs [fol. 2019] of the traffic, being the transcontinental traffic.

Well, let me give you some of the very issues that you hear, some examples of what exactly the cost of the transcontinental traffic is, what they claim the cost of the traffic, transcontinental traffic is.

Judge Barnes: Don't you agree that each side has got to put in their evidence?

Mr. Belnap: Yes, sir. We don't complain on that. But I hate to have a man on the principal side of the street as if we are chiseling on our side, and I don't think we are.

I want to—it isn't that to which I am directing my attention to, Judge Barnes. It really is how far they reached out on the very questions here under dispute to get a figure which they then imputed to this traffic.

Let's take maintenance of way costs, the running, the maintenance of way. We are dealing with the out-of-pocket portion. Rail Form A takes 80 per cent of the total maintenance of way costs for each group, calls that out-of-pocket, divides it by the total gross per mile, makes a unit out of that, applies the unit to the traffic, so much money per gross ton mile.

The Transcontinental lines do the same thing in part. They start out with the same amount of total maintenance [fol. 2020] money. They got the same number of gross per miles in the group in which they are dealing, because they went on the group basis, too.

But instead of proceeding directly to determine what portion of those total expenses varied with the traffic, that is out-of-pocket, instead of doing that they said, let's determine separately the constant portion of these costs, let's determine it per mile of line for each of these groups, let us multiply this money per mile of line by the number of miles of line in each group. That will give us some dollars and we will deduct that from the total and we will put the rest out at the variable costs, out-of-pocket costs, and reduce it to units per gross ton mile. And then we are going to apply those to all of the traffic, whether it is local, transcontinental, interchange with some other lines of railroad some place else, branch lines, main lines, it doesn't make any difference. We will put those costs over all this traffic and we will get these variables by this method.

That sounds very good. The Commission thought that was a pretty good idea in principle, to get the constant cost in dollars per mile of ride for these various railroad groups. But it didn't like the way the Transcontinentals went about it.

What the Transcontinental lines did, they took a U.S. [fol. 2021] average, a U.S. average for mile of lines that they computed by regression process of their own, and they treated a mile of line on the plains, with no bridges, no tunnels, no nothing of that character as having the same constant cost as a line right up through and over the Continental Divide.

And the Commission says that conceals territorial differences. And they didn't buy it on that basis. And that is the reason they didn't buy it.

But the Commission didn't stop there. They took a look at Rail Form A, and it entered the findings which we have set forth in our—the findings set forth in our proposed findings of fact where they give the affirmative reasons for

maintenance way, as for every one of these other circumstances or other factors for using railroad group averages as fairly representative of the specific costs.

Now, let me give you another example, if you please. In the case of engine costs. That is the maintenance, the depreciation and the out-of-pocket return on the cost of locomotives.

Rail Form A reduces 80 per cent of the total of that figure—80 per cent being the out-of-pocket portion—to a unit for gross ton mile and applies it to the traffic.

Now, when that is done you are going to find you have [fol. 2022] got a unit cost over Eastern territory—I forget the exact figure, it is 30 per cent, about 30 per cent as I recall it, higher than the unit costs to transcontinental carriers.

It is in the interest of the Transcontinental lines to break that down so that there wasn't any difference between themselves and the people to the east of them. So what did they do?

Well, in the first place, they tried equating the locomotive costs to fuel expenses by engine districts on the very complicated engineering formula designed by an engineer for the Southern Pacific, Mr. Poole, and applied them to their traffic samples.

The Midwestern lines, when we unraveled their cost study, we found out how much money was involved in that application by each railroad group. Then we found what the money—what relation the moneys would be if these locomotive costs were the conventional Rail Form A on a mile basis.

And it appeared that this relating the locomotive costs to the fuel consumed by engine districts amounted to just about the same relative cost as Rail Form A.

And when that happened the Transcontinental lines undertook a second cost study. This time they put it on a locomotive mile basis. And the locomotive mile basis they took was the U.S. average, excluding only the Southern

[fol. 2023] region. And they called that representative of transcontinental traffic. A completely impossible concept.

The Commission rejected that. And why did the Commission stay with Rail Form A? It did so on the basis of the Transcontinental lines' own evidence in their first cost study that when you study these locomotive costs by engine districts in relation to the fuel consumed, you got the same relationships among the groups as you got under Rail Form A. And it was on that basis, if you please, that the Commission used the Rail Form A in its re-cost figuring of the Transcontinental lines traffic.

Judge Mathes: Did the Commission use that form because it did not have the power to tell these roads--

Mr. Belnap: I am quite sure it didn't.

Judge Mathes: To tell these roads—

Mr. Belnap: I am quite sure it didn't. And let me address myself to that point.

This question about—well, in the first place, this question of power was only raised, as I understand it, in connection with empty return ratios. But whatever it was raised in connection with, during the course of the hearings before the Commission there was at no time as to the empty return ratios on which they now make the point, at no time did the Transcontinental lines request any other line, any other party to present data, at no time did they [fol. 2024] make a motion to, a petition for an order requiring anybody to present data.

They raised this point only in their petition for reconsideration, sort of involved argument. But it is certainly unintelligible to me.

Judge Mathes: Do you know any reason why the Commission eschewed any powers?

Mr. Belnap: I see no reason. Of course, I should think that the Commission has power to require any kind of report within reason from the railroads.

Judge Mathes: Certainly from applicants.

Mr. Belnap: But I don't know how far they can go in making special studies.

Judge Mathes: Such as maps and—

Mr. Belnap: Certainly. If there is any question of power —if your Honors please, this court is never going to get to that question. And may I explain why?

This is back on the empty return ratios.

Judge Mathes: The only reason I raise the question at all, is there any basis for feeling that the Commission used less than the best evidence because it felt it didn't have authority to compel the best?

Mr. Belnap: No, sir. No, sir. Let me give you the setting—

Judge Mathes: You don't need to spend any more time. [fol. 2025] Mr. Belnap: Well—

Judge Mathes: Unless you just wish to.

Mr. Belnap: I just would like to fill it out in this respect, that empty return ratio.

The Transcontinental lines came in their first cost study with a very novel rate, very novel way of measuring the empty return ratios in their own territory and on certain lines in the Midwest. And made no—and just imputed, just a guess for the East.

And the Eastern lines and the Midwest both show the invalidity in the process which they used sufficient that they didn't go to the Commission with it, that is, they didn't finally submit it is the thing.

They re-costed their traffic on the basis of another empty return method, study method.

Now, when they did that the Eastern lines and the Midwestern lines felt themselves obliged to go out and make some similar special studies. They didn't do to the same sample because these Midwestern lines used the traffic sample that is the basis for all these revenues and cost figures.

The Transcontinental lines didn't use that for some reason, they got a special selected set. But the Eastern and Midwestern lines came in with some empty return [fol. 2026] ratios purporting to represent the cars in this traffic sample involved in this lawsuit. The Commission refused to use that. They refused to use the Midwestern test, they refused to use the Eastern test, they refused

to use the special test of the Transcontinental lines. And they did it on the ground that they needed comparability and these were not comparable.

But the Commission did more, if you please, as far as the affirmative statement of its reasons are concerned. On page 87 of our proposed findings of fact we spelled out at the top why they refused to use the defendants' methods.

Beginning then at the bottom of page 87 on line 22 and extending over to line 11, the Commission sets forth why it deemed affirmatively Rail Form A to be the answer.

And I might make plain that these seven-day studies the Commission makes are made under Commission orders. It specifies the days, it specifies how you go about counting the cars, the empty movements and the loaded movements. It doesn't provide for the separation of various kinds of boxcars, it is all in one pot. But it puts the refrigerators out by themselves, whether they are owned by private car companies or whether they are owned by railroads.

It tells you what kind of cars, tells each railroad how to make it. Those railroads report under order to the Interstate Commerce Commission and the material is there in [fol. 2027] the possession of the cost section to be used in this type of costing by anybody who wants to come in and get it. And that is that seven-day study, that is what it amounts to. And these are the reasons the Commission gave and it is most important, it seems to me, your Honors, that they say this precisely, the seven-day studies of the Commission uphold a more reliable basis of comparison among territories—flat, affirmative.

They also say the seven-day study—and I quote—"provides appropriate comparative ratios to the traffic at issue."

And those are the support, if you please, for the Commission's use of empty return ratios.

And I might as well dispose of two other points at the same time. By their terms those findings apply to the refrigerator cars, which Mr. Trienens has mentioned in passing. That takes care of that situation. You have got a finding.

I told you about the locomotive costs that the Transcontinental is trying to say this is transcontinental traffic, although it was the whole U.S. average. Take a look at the car costs. I think the car costs the first time—the first time, I am not sure about it, but I think they used the U. S. average then.

[fol. 2028] But when they took their second cost, they took their second bite and relied on something they would finally submit to the Commission, they didn't use the U. S. average, what they did was take the Midwestern average cost of car ownership, per car mile, which, of course, is fair and honest for the Midwestern Railroad group. It represents their actual experience. It took that car cost per mile for the Midwest and computed it for the transcontinental lines, and it imputed the same figure to the Eastern lines, and the purpose there again was to try to get an equalization so that the higher costs per car mile in the Midwest and in the East would not appear. You would get a leveling process and that high as the Commission found, and they found it. They said that concealed territorial differences and they would not use it.

Now, there was some Eastern witness who came along in the process of this hearing and said, "Well, now, there is another reason why you get differences in the East than you get in the West." East was lumped up with the Midwest and transcontinental together then.

He says, "That is because the engine district averaged so many miles in the East and so many miles in the West," and he gave some operative explanation that that would lead to difference in cost per locomotive mile, for example, car mile.

[fol. 2029] The Commission says that in their report. Now, the transcontinental lines say now, coming to this court, that those figures set for the difference in the length haul are not accurate. Instead of one group being 21 miles longer than the other—I just pick that out of the air, that is not the right figure and I know it. But instead of being 20 miles it is only 13 miles difference. If the Commission

had known it was only 13 miles difference then it very well —we can't tell, it probably wouldn't have rejected the transcontinental claim to locomotive mile cost based on the U. S. average. It might have rejected it. It might not have used Rail Form A.

Your Honors please, that certainly doesn't follow—I don't care what those miles are and I haven't attempted to prepare it, even to find out what they were, because it is a perfectly inconsequential point. The Commission had resolved upon findings which I spelled out in this argument and which we have shown quoted in detail in our proposed findings of fact.

The Commission had determined upon the reliability and the appropriateness of the use of Rail Form A factors and if Mr. Trienens thinks that is an integral part of the findings I have difficulty reading it that way. You can throw it out the window and you would still have a perfectly valid report.

[fol. 2030] This thing of saying, "Well, how would the court know, how would the court know the Commission would come to the same conclusion?"

I don't think that is quite the essential point. This isn't a Chenery point, where the court has to proceed on the basis which the Commission proceeded on. You knock out one point and you have got nothing left. You can't supply something in the evidence.

This is the prejudicial error point. Here is what the Supreme Court said about that kind of situation in the National Labor Relations Board case in 308 U.S. 241, where the findings were criticized without support—either without support or contrary to uncontradicted evidence. The Supreme Court said, "We do not stop to consider these contentions since without such findings there would still be basis in the record for the Board's conclusion."

Then Mr. Kaier, who argued here, was over in the Second Circuit in the Feinstein case, 317 F. 2d 509, where they said:

"Even though the Commission's reliance was misplaced on a certain matter, it was not vital to its decision."

Therefore, it did not warrant setting the decision aside.

Judge Crary: Mr. Belnap, in short, is it your position [fol. 2031] that the studies that you have made, all this evidence you have been talking about,—the briefs are full of it and half the transcript was concerning costs—

Mr. Belnap: Easily.

Judge Crary: —that these studies that you have made are proper, your results are proper regardless of what the plaintiffs may say, your results are proper. Therefore, your divisions, the divisions of the ICC are valid and just divisions and it doesn't make any difference what the financial effect of the divisions may be.

Is that in substance your position?

[fol. 2032] Mr. Belnap: Not quite, sir. The cost aspect of a division case is a separate concept from the revenue needs—

Judge Crary: Yes.

Mr. Belnap: —of the carriers.

Now we have to look, as Mr. Trienens in his attack, concerning Issue 20, he is not concerned really with anything except the yardsticks by which the costs were found, the method by which the costs were found, and those costs were used directly by the Commission.

As I referred to in that summary from page 79 of our proposed findings for the seven or eight different places, it came to essential or basic findings which were based on costs.

Now, you will recall, and I will take the Midwestern situation as between the transcontinental lines. We subdivide every division west of the Mississippi or Chicago with the transcontinental lines on the basis of divisional scales.

As far as traffic from Chicago to San Francisco, we divided on the basis of divisional scales. Where the scale out to Denver, let us say, or Cheyenne, one set of integers

and 10 per cent more integers per mile or percentage-wise are applied west of that point.

The Commission said in its report at 322, 509, "We complained about that 10 per cent." We said, "It can't possibly [fol. 2033] be justified under any evidence in this record." But the Commission is the expert here. I guess it was justified because the Commission said that the divisional factors made higher in Mountain-Pacific than in Midwestern territory gave fair recognition to the evidence. They said that at 322 ICC, at 509.

We accept that as within the expertise and the discretion of the Commission to say, "We considered your controversy. We think what we did is fair recognition of the evidence." We are not in a position to dispute that as a matter of law.

Judge Mathes: Do you agree, Mr. Belnap, with the findings of the Commission in the division proceedings such as this must be expressly related, at the very least, to all the factors specified in Section 15(6)?

Mr. Belnap: If there is any dispute at all as to any of those factors, its significance or anything else, I think that becomes a relevant issue to the Commission's decision as to whether it thinks a division should group or should go down, and it must consider all those points.

Judge Mathes: Must not the findings affirmatively show that the Commission did consider those factors, at least those factors which Congress said should be taken into consideration?

Mr. Belnap: Yes, I think there is no question where [fol. 2034] there is a dispute.

Judge Mathes: Whether there is dispute or not, mustn't it show?

Mr. Belnap: Well, for instance, here is a case in which I say nobody put in any evidence on relative efficiency. The Commission wouldn't stop the case and say, "We can't decide this unless you tell us about this." There is no dispute between the parties.

Judge Mathes: Must not the Commission in taking away something from one and giving it to another make an affirmative finding on that fact, to show it has considered the very minimum that Congress said must be considered?

Mr. Belnap: I think your Honor is right. I say there has got to be a dispute.

First, there is a dispute as to what the costs were. What is Midwestern's share of the cost or is it that we only earn $1.39 when the transcontinental lines are earning $1.71? Is that the relation? Are we under that handicap or is it a lesser handicap or a greater handicap? That is in dispute. The Commission had to make a finding as to whether the transcontinental lines were favored or not by the revenues relations costs.

It made a finding and it used this comparison I pictured for you as the basis of the finding. The Commission had to make a finding on our need for revenue, our relative [fol. 2035] need for revenues, and it said as to that that the Midwestern lines are not as bad off as the Eastern lines but they are a lot worse off than the transcontinental lines. It said those things, it made the finding.

As your Honors note, the script is thrown away. I have just been talking. I think I have said all I have to say on these points.

Judge Barnes: It looks as though we will have to go to tomorrow.

How much more time will you gentlemen want?

Mr. Eshelman: I think we will want the balance of our three and a half hours, your Honor.

Judge Barnes: You have 55 minutes left, the way I figure.

How much time do you plan in reply?

Mr. Trienens: I think 45, 50 minutes, assuming it keeps this pace up. Perhaps less, I would hope. I can't know until I hear it.

Judge Barnes: We will take an adjournment at this time until tomorrow morning at 9:00 o'clock, if that is agreeable to you gentlemen. We have some problems with

the judges that have emergency matters tomorrow. If we start at 9:00 we should be able to finish somewhere before 11:00.

(Whereupon at 4:42 o clock p.m., Thursday, November 19, 1964, an adjournment was taken to Friday, November 20, 1964, at 9:00 o'clock a.m.)

[fol. 2036]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

The Honorable Stanley N. Barnes, Judge, U.S. Court of Appeals; The Honorable William C. Mathes, Judge, U.S. District Court; The Honorable E. Avery Crary, Judge, U.S. District Court.

[Title omitted]

Reporter's Transcript of Proceedings—
Friday, November 20, 1964

Place: Los Angeles, California

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[fol. 2040]

Los Angeles, California,
Friday, November 20, 1964 9:00 A.M.

The Clerk: 63-745, The Atchison, Topeka and Santa Fe Railway Company v. United States of America and Interstate Commerce Commission, for further oral argument.

Mr. Johnston: The court please, I would like to announce a stipulation that the parties have arrived at in regard to corrections of the transcript, subject to the approval of the court.

It is suggested that each side write to the reporter with suggested changes, with copies to the other side, and then the reporter, unless there be objection, make the necessary changes in the judges' copies, if that meets with the approval of the court.

Judge Barnes: That will be all right.

Judge Crary: You are talking about the transcript. Which transcript are you talking about?

Mr. Johnston: I beg your pardon, your Honor?

Judge Crary: You are talking about the transcript—

Mr. Johnston: Of the oral argument.

Judge Crary: Of the oral argument. All right.

ARGUMENT ON BEHALF OF THE INTERVENING DEFENDANTS THE BALTIMORE AND OHIO RAILROAD CO., et al. (Continued)

Mr. Eshelman: May it please the court, I am Joe Eshel-
[fol. 2041] man. I should like to take 15 minutes, in order to leave some time for my associates.

Before discussing the issues assigned me, I should like to answer some questions asked yesterday and call attention to certain established principles in division cases that may not have been left clear.

Judge Barnes yesterday asked some questions when we were discussing the dollar amount of revenue required, and impact, and I can give him a few figures, but I also want to point where other figures are available if the court will look at them.

In the first place, in 1953 the total revenues of the seven transcontinental lines were $1,980,179,377.00. That is found in Exhibit T-311, at page 7.

The $45,000,000.00 that Mr. Trienens talked about would be roughly two per cent of the gross.

There is also operating revenues for 1958 of the transcontinental lines of $2,105,341,102.00, and that is found in Exhibit E-701, at page 1.

There are also investment figures there if anyone desires to come to the effect.

Let me say there is a great deal of data—

Judge Barnes: Those are in evidence?

Mr. Eshelman: Pardon me, your Honor?

Judge Barnes: Those are in evidence?

[fol. 2042] Mr. Eshelman: Those are in evidence, your Honor.

Judge Barnes: Was there any finding made as to those?

Mr. Eshelman: No. If I might just first give you the citations so they don't get away from us, and then I would like to answer that question.

Judge Barnes: Fine.

Mr. Eshelman: I would call attention to Exhibits E-36, 36-A, -502, -701, T-273, and there will be others.

Also I would like to direct attention to the table at page 107 of Mountain-Pacific lines' petition for reconsideration. Also to the computations showing the effect of an assumed $50,000,000.00 shift in revenue from transcontinental lines, which appears at pages 331 to 337 of the Eastern Portion of the administrative record, which we designate

EPR, and particularly at pages 336 and 337. This shows that there would not be an impairment of transcontinental lines' carriers' ability to meet their own revenue needs if there were a shift of the amount.

Now coming to your Honor's question as to why the Commission did not so find. The answer is that it did not consider that it had to find it in that fashion. Right at that point it is perfectly simple, of course, to change it into base amount and to employ any rate of return deemed fair. But after doing so those amounts would not be es- [fol. 2043] pecially useful.

Let me explain. Suppose we say that the transcontinental lines need so many billion dollars, Midwestern lines need so many billion, and the East needs so many billion. That is not a handy figure for anybody to use. The people that are in the game don't use that. They use rates of return because that puts it on a common denominator. But if you want the base figures they are right here in the record and you can find them.

The Commission did consider all benefits—

Judge Barnes: How do we know that the Commission did consider them?

Mr. Eshelman: Because it dealt with those rates of return and discussed them. That is the very point of what they did and they did it—

Judge Barnes: But how do we know, was there any conflict among the figures?

Mr. Eshelman: No, I think not. For instance, these figures that I pointed to here in the E series, those are all net investment figures. There were also put in, as I recall, these elements of value. And, of course, the transcontinental lines say, "Don't look at elements of value." And the Commission says, "Well, that is the basis we have been giving you revenue on in these rate increases and we think it is more fair than one which goes back to the old [fol. 2044] days when there was some question about whether those figures were padded."

In any event, the Commission did consider this thing from both sides and not merely the effect on Eastern lines, as in the Colorado case, but on both sides. You recall that Commission finding where they say, "We have considered the benefits and the detriments." They considered both.

I am going to come to another point that will bear on that, also.

One question of principle that seems not to have been made clear, the very essence of Section 15(6) is to empower and require the Commission to make divisions which may be fair proportions, and that is without any regard whatsoever to whether those rates are high or low, whether they are compensatory or confiscatory. The right of the Commission to fix a fair division as long as it does not go beyond more than justice. That is established, and I refer to the B & O citrus case, and I refer to the 298—

Judge Crary: Mr. Eshelman, I don't like to interrupt you, but referring to that case, as long as you have mentioned it, and on page 156 of your brief you point out and you quote from that case, " . . . the fact that the share allotted to one is not compensatory is without legal significance." And that is the point you are making.

[fol. 2045] Mr. Eshelman: That is right.

Judge Crary: Now, going on with that same quotation it says:

"The fact that the share is assigned to one is non-compensatory will be of evidential value if accompanied by evidence that some other carrier is receiving better treatment. But, unless it appears that some other carrier was so favored, the non-compensatory character of the division would be entirely immaterial."

Now, how can you tell whether some other carrier is favored unless you have these figures? That is the thing that bothers me.

Mr. Eshelman: Very readily, and I will explain that.

In the first place, I think you are reading from the case, the concurring opinion of Justice Brandeis.

Judge Crary: Yes.

Mr. Eshelman: And, as I recall, Justices Stone, Roberts and Cardozo joined. That concurring opinion is very well worth reading, because the points on which the minority and the majority differed were not with respect to this principle that I am making.

Now, coming to your question, your Honor, the answer is if there is enough in the rates so that there is enough to be fair to everybody a fair division cannot hurt any-
[fol. 2046] body.

The other answer is this: That if any carrier is in such a shape that a fair division would seem to hurt him, then the answer has to be that he must seek divisions greater than justice, larger than justice would demand. But there is not one carrier here before the Commission or before this court that has asked the Commission for more favorable treatment than the group to which he is assigned. This is a group case. This was never handled as an individual carrier case, although an individual carrier could come in and say, "Here is my evidence, I want to be heard—"

Judge Barnes: What about the position that they had no reason to think they would have to until such time as they found out where these gateways were.

Mr. Eshelman: The New England divisions case is a perfect example of it. The Commission's first decision was in 62 ICC, in which they said, "Well, this is pretty bad, but we can't do anything about it."

Then came the 66, in which they put in their order.

And, incidentally, you remember in that case, that is where Commissioner Potter said that, "This shift of revenue isn't taking from anyone anything that belongs to somebody. This is joint revenue, it is really jointly owned and the question of what is fair is for the Commission."
[fol. 2047] But I am missing my point. What I wanted to say was this: The Supreme Court upheld that decision, even though there were a good many things to be done afterward.

If you will look in 126 ICC you will see a great amount of changes that the Commission made and specific differences they made after the Supreme Court had sustained that opinion.

Judge Barnes: That doesn't quite answer my question because you would have to assume the same facts existed in that case as you cite existed here, where there was an unknown.

As I understand it, there was a reallocation of division points—I perhaps am not using the exact language—

Mr. Eshelman: I think I understand you, sir.

Judge Barnes: —which was not anticipated.

Mr. Eshelman: No. This was an anticipated situation here in this case. You will recall that the Commission said that even under Midwestern lines' own evidence that there are certain of these Midwestern lines they were going to have difficulty with.

Some of these group situations do not fall equally on all. That was the very purpose of the Transportation Act in 1920. It was the purpose of Congress that the Commission would use these powers, which Justice Brandeis in the New England divisions said, "This is one of two schemes [fol. 2048] Congress put up for the evening out of these things. But the Commission doesn't have to do it all at one round." This would be the first round. The next round would be the detail.

Another thing—

Judge Barnes: Are you saying it doesn't have to be just and equitable in any of the steps as long as—

Mr. Eshelman: No, I do not say that, but I say the Commission does not have to do a perfect job at once. They only have to go over the issues as framed. Now, these issues as framed—

Judge Barnes: And the statute that controls.

Mr. Eshelman: Pardon me, sir?

Judge Barnes: And the statute that controls.

Mr. Eshelman: Here I see I have failed to make a point I was coming to.

Another principle is this: The Commission under this statute, which has been construed by the Supreme Court, may deal with groups without considering the individual lines, unless someone comes in and says, "I want to be heard specially on this", and puts in his evidence.

There is no question about the Commission having a right to deal with interterritorial divisions and not intraterritorial, or to deal with group divisions and not with subdivisions.

And I rely right on New England divisions, I rely on [fol. 2049] Abilene, I rely on Beaumont, and if the Colorado court's decision—if that decision is taken as being contrary to that, well, it just doesn't square up with those Supreme Court opinions, that is all.

Incidentally, on that Colorado matter, if the court had looked at the facts that Justice Brandeis and the Supreme Court were dealing with in the Abilene case, they wouldn't have made the finding which is at variance with the principle that I have just stated to you.

One thing I did want to say. Relative costs is the primary criterion of what is fair and just, and as long as the Commission does not go beyond what is fair and just there is no reason to deal with findings of absolute amounts, in any event. It is only where they go over that that the Supreme Court in several cases—I think they are the New England divisions, Abilene, the Dayton and Goose Creek and this B & O case—in those cases the courts have said if the Commission does more than justice, then it must avoid confiscation to the other. But that is the only place that the absolutes come into account.

Now then, what did the Commission find here and what does the record show here as to how these divisions tie up with relative costs? In the first place, they held as to Eastern lines the prescribed divisions would give the East 25.3 per cent of the total revenue, while the Eastern [fol. 2050] lines are bearing from 26.1 to 26.7 per cent of the costs.

The record itself shows as to Midwestern lines that their costs are substantially equal to those of Mountain-Pacific lines.

And I refer again to this Eastern portion of the administrative record at pages 19 to 21, and you will see there the reference to the exhibits of record that prove that point. Yet the Commission fixed divisional factors to the Mountain-Pacific area 10 per cent higher than for the Midwest, so that certainly they are well within the bounds.

I would like to come to Issue 8 just briefly and say that as to the typicality of the Montana divisions I rely upon the record citations and the record references which appear on pages 45 to 46 of our findings—I mean Findings 45 and 46 at pages 48 to 51.

On Issue 7, which deals with 15 per cent divisions—that is in the Southeastern Illinois group to the two westernmost Pacific groups—I rely on the record cited in Findings 41 to 43 at pages 43 to 48, plus this fact: Plaintiffs make a computation and they say according to these figures there is only a 7 per cent difference of costs. You will find it right over here in their portion of the record at page 512. They say, "Why, here is your Eastern composite costs for Eastern and Western lines."

And, incidentally, Judge Mathes, those costs are fully [fol. 2051] distributed costs. These are freight costs. They do not include the passenger deficit, but we do have costs that include the passenger deficit. And, moreover, because they are fully distributed they rank pretty well with the out-of-pocket costs our friends persuaded the Commission to use and which would then have taken the other into account.

What I would like to say is this: If you take that scale and apply it to the facts of this 15 per cent group you will find this: The plaintiffs assume, without one shred of backing for it, that the average haul in the Southeastern Illinois group does not average more than 50 miles.

I call your attention to Exhibit 487 at Appendix D, page 3, where you will find that there are important points

in that group which are in the 150- and 200-mile block from the East St. Louis gateway and from Chicago, as you can see by the map which is appended to—which is in plaintiffs' opening brief, opposite page 32. You could see that some of those points from Chicago would be farther away than from East St. Louis.

Coming to Issue 6, which deals with specific percentages, I rely on Findings 36 to 40 at pages 34 to 42, and I would say this: When you come to look at those findings you might consider it in this fashion: I wanted to spell it out more, but I will have to be short. The fact is that [fol. 2052] the Commission first did give consideration to these elements, that Section 15(6) must be considered and they did that first as to the over-all.

Then you will find that they took up individual group percentages and dealt with those and used those as illustrative and as representative, and you will find that right in their findings.

In a way counsel's suggestions that you don't need—I have asked to have placed before the court, by the way, the 75 percentages, the single-page exhibit, and if you will notice those are in geographical order so that as you read from left to right you would be going from west to east of the Eastern groups. In other words, Southern Illinois first and going on to the Seaboard, New England, and you can see how nicely they grade up.

Also you can see, by reading down from any group, how they tend to grade with decreasing distance in the West. In other words, it is an orderly, rational prescription that the Commission has given.

But you will also find, if you wanted to make the computation, you could take this same scale our friends use here at PR-512 and compare those with some of the mileages that are in Exhibit E-701, and there you will find mileages from such points as these Pacific Coast cities to these points in the East.

[fol. 2053] If you care to make the computation which I did with a slip stick—I wouldn't swear the last percentage

is just right—Detroit I figured at 16.28 as against the 17 prescribed; Pittsburgh 22.9 as against the 22 prescribed; 28.64 at Syracuse as against the 28 prescribed; 34.84 in New York Seaboard as against the 34 prescribed, and 36.7 for cost at Boston as against the 34 prescribed.

And don't forget every one of those were from San Francisco, which was the longest point of the four Pacific Coast cities.

You would get even a more favorable situation if you were to average those Pacific Coast cities. But my friends on the other side say, "Oh, but you take Pittsburgh or you take Detroit and they are on the long side of the group."

I would ask your Honors to turn to this map opposite page 32 of the plaintiffs' initial brief and see if these Pacific Coast cities that are used on the other side of the equation aren't also right up next to Tidewater. The point is that the Commission made tests of what it made. These individual percentages it tested by means of these particular scales.

Take, for instance, Pittsburgh. They say in so many words, and you know they tested it because they made this finding.

[fol. 2054] I see I am running out of time. I will close.

They made this finding on plaintiffs' own scale, which included—which the Commission didn't even think was quite right, that that would have produced a percentage from the Pacific Coast groups to Pittsburgh via St. Louis, which was 25 per cent, and that happens to be what the Commission prescribed.

I see my time is gone.

Thank you very much, your Honors.

[fol. 2055]

ARGUMENT ON BEHALF OF THE INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY CO., et al.

Mr. Hamilton: May it please the court, my name is Bryce Hamilton. Although my appearance both before the Com-

mission and before this court is for the Midwestern lines, I am speaking for all parties on the defendants' side.

Time will not permit me to cover all of the issues which Mr. Cerra said I would cover. That is due in part to several points brought up yesterday by Mr. McCullough which we do not think are before this court.

First is this point of confiscation. Although he did not used the word "confiscation" and emphasized the word "loss," he did say that he was renewing each and all of the contentions in the opening brief of the Frisco and in the reply brief.

And one of those is confiscation.

Now, under order of this court the parties submitted a joint statement of lists—of issues remaining in controversy. That list, although we didn't agree on the precise wording of each issue, we did agree on the area of each issue. And the list signed by both sides said the following issues and no others remain in controversy. This alleged confiscation claim of Katy and Frisco is not in that stipulated list.

[fol. 2056] Furthermore the point is not before the court because it was not properly raised before the Commission. The Supreme Court has held in a number of cases cited in our brief that mere losses, in the sense of reductions in revenue, differences in revenue before income taxes are not confiscation. The confiscation can only be shown by allegations of specific facts that your carrier is called on to handle traffic at a loss.

In their petition they filed with the Commission for reconsideration, and also in their petition for reopening for further hearing, there are no allegations or specific facts to show that the order would require the Frisco or the Katy to handle as much as one shipment at less than the cost of handling. All they have done is given you their computation—it is not in the record as evidence, it is only in the record as allegations in the petition before the Commission—as to the difference in revenue that they would receive in the course of a year under the new divisions

as against the old divisions. They don't tell you what is left, what they do receive under the new divisions, and there is no claim that as much as one shipment is handled at less than cost.

The Katy and the Frisco receive the same treatment in the midwestern territory as other railroads.

Transcontinental railroads operating in midwestern ter-
[fol. 2057] ritory, other midwestern railroads, the Katy and the Frisco, all receive the same scale where they perform originating and terminating service, and all receive the same scale of divisions where the service is only that of an intermediate carrier.

The second point of Mr. McCullough to which I wish to address myself is his claim that the Commission denied him a fair hearing when it refused to grant his petition for leave to—for permission to introduce further evidence to show the revenue effect of these orders on these two particular carriers. That point, although in the opening brief of the Frisco and the Katy, was not preserved in the list of issues remaining in controversy. For that reason only it is not before this court.

In the second place I respectfully submit that there wasn't any denial of a fair hearing by the Commission because there was no point in reopening the case to let the Frisco and the Katy prove nothing more than the difference in revenue they would receive under one set of divisions as against another set of divisions. If they had offered to show facts that they were being called upon to handle traffic at a loss you would have had a different story. But there was no such showing.

The Supreme Court in the case of Interstate Commerce Commission v. Jersey City, 322 US 503 at 514 and 515 [fol. 2058] specifically held that the granting of a petition for reopening is in the sound discretion of the administrative agency, and that the decision of the agency will not be overturned by the court unless there was a plain and clear abuse of discretion.

Next I wish to discuss one aspect of the point as to whether the Commission was required to make findings as to the revenue effect on individual carriers.

Mr. Kaier dealt with the subject from the standpoint of the groups of carriers. And Mr. Eshelman further elaborated on the point. I will discuss it only as it applies to the Frisco, Katy and Rio Grande.

Although Section 15(6) of the Interstate Commerce Act speaks in terms of individual carriers, the Supreme Court nevertheless held in the New England divisions case that in the light of the legislative history, the well known purpose of the statute, the practice of the Commission of hearing rate cases on group or regional bases, that Congress intended that divisions cases could be heard on regional or group basis just like rate cases, and the problem of the individual carriers dealt with later. Now, that, of course, means—

Judge Mathes: Mr. Hamilton, wouldn't it be obligatory upon the Commission to make the positive finding of the factors mentioned in 15(6) to satisfy, so to speak—in other [fol. 2059] words, would it be, is it enough to say this is fair for this group, must the Commission say it is fair for all members?

Mr. Hamilton: I think not, your Honor.

Judge Mathes: Or provide that this is fair for the group but as to some railroad, X railroad, it does not provide a fair return and therefore the division isn't equitable?

Mr. Hamilton: The Commission couldn't make such a finding in one of these group cases. In this one, for example, you have 350 railroads. The problem each one of them—

Judge Mathes: Why do you say it couldn't be done?

Mr. Hamilton: Because you don't know the effect, your Honor, unless the Commission fixes not only the division for the group, but also the division for the hauls of each carrier in the group. And the Commission was not asked to take that second step in this case, except in a few instances.

A good illustration is the Denver and Rio Grande Western. The Commission fixed the division that carrier operates between Pueblo and Denver on the east and the Utah gateways, as we call them, Salt Lake City and Ogden on the west. The Commission fixed—now I just use the Denver and Ogden gateways—the Commission fixed the division, [fol. 2060] not of the Denver and Rio Grande Western, it fixed the division of the Denver and Rio Grande Western and its connecting carriers west of Ogden and west of Salt Lake City.

For example, it fixed a collective division for the D & RGW to Ogden and the Southern Pacific from Ogden to San Francisco, leaving those two carriers in the first instance, as Justice Brandeis said in the New England case, to fix the subdivision of the new division as between themselves. And if they couldn't agree, then they would apply to the Commission.

Likewise, the Commission fixed the division of the Denver and Rio Grande Western to Salt Lake City and the Union Pacific beyond collectively. The division of the D & RGW and the Southern Pacific beyond Ogden.

Now, that wasn't done over the protest of the D & RGW. The D & RGW was a member of the Transcontinental group. We asked the Commission—the Midwestern Group lines did—to fix the divisions over the Utah gateways as they have heretofore been fixed, and then subdivide that.

But our Transcontinental friends, including the D & RGW, said no, don't do that. In the first place, subdivisions of railroads in the Mountain-Pacific territories are not involved under the pleadings. We disagreed with that but that was the conclusion of the Commission and our friends, that the pleadings didn't bring them in issue.

[fol. 2061] In the second place, they said the Midwestern lines have no legitimate interest in what subdivisions the individual railroads receive in the Mountain-Pacific territory. It is none of our business, they said, it is enough that the Commission fix the division to Denver for the haul between Chicago and Denver, for example, leaving—and then

the collective division, Denver to San Francisco, leaving the subdivisions of the individual carriers to be dealt with later.

And that is precisely what the Commission did. It fixed the same scale of divisions for hauls of the D & RGW and its connecting lines as it fixed for other Mountain-Pacific lines, 10 per cent higher than the scale in the Midwest.

And as I have already mentioned in the Midwest, the Katy and the Frisco likewise were given the same treatment.

Judge Mathes: Is it your position, as I understand it, that the Commission is still waiting, so to speak, to take up these problems wherever—

Mr. Hamilton: Probably never will have to take them up.

Judge Mathes: Of course I don't know, nor do you know.

Mr. Hamilton: We don't either, that is my best guess, [fol. 2062] based on past experience.

Judge Mathes: That is on the fair returns, the D & RG, for example, is still open.

Mr. Hamilton: Correct. That is correct, your Honor. The Commission has not fixed a division for the D & RGW. It has merely said apply the scale, Denver to San Francisco—assuming the shipment is going there—and you get a percentage for that joint haul of two railroads. And they haven't said anything beyond that.

So the order does not touch or fix the revenue of the Rio Grande Western Railroad and it doesn't fix the revenue of the Southern Pacific between Ogden and San Francisco.

Judge Mathes: You mean it doesn't fix the D & RGW share?

Mr. Hamilton: Yes, its share or subdivision as we call it.

Judge Mathes: Yes.

Mr. Hamilton: And until you have that share you can't have the revenue. You have got to have the share first before you can compute what that share would be translated into dollars.

Now, on the next point I wish to discuss—

Judge Crary: Before you leave that point—

Mr. Hamilton: Yes, sir.

Judge Crary: Do I understand your position is that [fol. 2063] although the statute refers to carriers, individual carriers, that when the Commerce Commission is dealing with a controversy or dispute between groups, that then you apply to the groups, the requirements of 15(6), which refers to carriers individually? Is that your position?

Mr. Hamilton: That is right, your Honor.

Judge Crary: Doesn't that conflict to some extent with the Colorado case?

Mr. Hamilton: I can't say that it doesn't with some straight dicta there. But I will read you one sentence from the Beaumont case in the Supreme Court. Beaumont, Sour Lake and Western Railroad v. United States, 282 US 74 at page 82. That is an interterritorial divisions case involving what we call Western Trunk line territory, roughly the northern half of the Midwestern territory, and carriers in the Southwestern territory, which is roughly the south half of Midwestern territory, an interterritorial divisions case.

The principle in the New England case was applied again. And here is what the Supreme Court said in an opinion by Mr. Justice Butler:

"When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may make the required determinations and establish the bases for divisions [fol. 2064] between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and order in respect to each rate."

And that is the principle that the Interstate Commerce Commission has been following in administrative practice in numerous divisions cases.

As the Commission points out in its supplemental report at pages 500 to 502 where they review the administrative

practice, they point out that in some of these cases the orders went to the Supreme Court and were upheld. No question raised as to its power to deal with the group, as distinguished from the individual, leaving the individual for later consideration.

Judge Crary: Isn't one of the controversies how you arrive at this typical evidence that you just read? The Colorado case deals with in practically its entirety the typical evidence, it is their typical evidence, and what we have to do is consider, isn't that right?

Mr. Hamilton: That was one of the points I was going to pass up—

Judge Crary: I am sorry.

Mr. Hamilton: No, no, I am glad your Honor brought it up. I will deal with it very briefly.

[fol. 2065] In the first place, the only parties that raised that point were the Transcontinental lines. And they only as to the Montana traffic. That is the only typical evidence claim the Transcontinental lines made.

The Katy and the Frisco made a typical evidence claim, that is a lack of typical evidence, as to traffic passing over their respective lines only. Now, we find the anomaly that the plaintiffs—and the word plaintiffs in those proposed findings includes the intervening plaintiffs—submit proposed findings of fact and conclusions of law which are not so limited, and would give the impression that this question of alleged lack of typical evidence applies across the board by all routes, all rates, all divisions.

In the first place, the Transcontinental lines cannot raise the point, other than as to Montana, because it is not in the list of issues remaining in controversy, as far as they are concerned.

In the second place, they represented just the contrary to the Commission. They told the Commission that it had a large comprehensive record on which this case should be decided. And they were asking for an increase of ninety-eight million dollars a year in their divisions. They thought the record was sufficient to give them an increase.

[fol. 2066] In the second place—

Judge Mathes: Is it fair to say—

Mr. Hamilton: I beg your pardon?

Judge Mathes: Is it fair to say that in your view of the case here before the court now is merely a group divisions case and any individual carriers who were hurt by this division may apply later?

Mr. Hamilton: If they can't negotiate what they think is a fair division with their connecting carriers, the doors of the Commission are always open.

Judge Mathes: To show that under this subdivision, under the subdivisions the individual carriers did not get a fair return?

Mr. Hamilton: Right, or you don't even have to say fair returns. If they think that the connecting carrier isn't willing to give a fair division, even though it would give a fair return, a fair division can be more than a fair return.

Now, on this typical evidence point—as long as I touched on it—the Katy and the Frisco likewise are not in position to raise that point in this court, even as to the traffic over their own routes for two reasons.

In the first place, they represented precisely the opposite to the Commission. They said, after the record was closed, the record in these proceedings is without doubt more com-[fol. 2067] prehensive and informative than any record that the Commission has heretofore had before it in any interterritorial divisions case."

In the second place I submit that our proposed finding 47, at pages 51 and 53 where the record references are all collected, and you will find a description of the record taken from a document signed by the Katy and the Frisco, as well as other Midwestern lines, the statement that it is the most exhaustive and comprehensive record the Commission has ever had before it in any interterritorial divisions case is a correct statement.

Included in that comprehensive showing are typical shipments in a scientific 629 or 621 car samples, of which 67 moved via the Katy and the Frisco.

Judge Mathes: Wouldn't your position be, Mr. Hamilton, that in one sentence that the Frisco and the Katy and the D & RGW have some individual complaints about subdivisions, the doors of the Commission are open, too?

Mr. Hamilton: That's right.

Judge Mathes: That is not involved in this case.

Mr. Hamilton: That's right. And the year has gone by and they haven't applied at that door either. And I don't think they are likely to.

Now, let me touch briefly on the question of what findings the Commission is required to make—

[fol. 2068] Judge Crary: Mr. Hamilton, they wouldn't have to apply to the Commission in order for them to find—there wouldn't be any occasion for them to apply now, would there, since they still have the old divisions at the present moment.

Mr. Hamilton: There is no law against it.

Judge Crary: So why would they apply now, I mean up until the time this is filed?

Mr. Hamilton: There is no law against it.

Judge Crary: There is no order against them, is there? Is there an order against them now? They haven't been injured so far, have they?

Mr. Hamilton: They didn't even have to intervene in this case, if they didn't want to, as plaintiffs they could have said, all right, we will just accept the group division fixed for the Midwestern railroads as a group and we will just ask the Commission to fix our individual part of those group divisions. But they haven't done that.

Now, as to these divisional scales which are prescribed in Western territory as between Midwestern lines and Transcontinental lines. The Eastern lines are not involved, except to a limited extent where one of them happens to have some tracks in the Midwest.

In this connection it is interesting to note that although our plaintiff friends in their opening brief made a very [fol. 2069] broad claim that the Commission was required

to relate the scales by findings to the several standards in Section 15(6), when it came to submitting the joint list of issues they backed away from that claim. And instead they now say the Commission is required to make findings relating the component elements of the division scales to the several standards of Section 15(6).

In other words, they no longer claim that the completed structure must be related to findings. And the reason they no longer complain I think is pretty obvious because the completed structure is related to Section 15(6) by adequate findings, one of which I will read. And it is the one mentioned yesterday. The Commission found that the prescribed divisional scales with a 10 per cent higher scale for hauls in Mountain-Pacific territory "give fair recognition to the evidence as to cost of service and revenue needs."

So our friends now say, well, at least, they have to make findings relating the bricks that go into the structure to the several standards of Section 15(6).

Now let's look at that claim for just a moment. In the first place, what did the Commission actually do? They told us in their supplemental report, and to some extent in their opening report, and further elaborated in the supplemental report. They said, we constructed these divi- [fol. 2070] sional scales not by any mathematical process or arbitrary formula, we constructed them through the process of practical judgment.

They said they started with the scale called the 29-886 scale, which had been in effect for ten years in Midwestern territory on traffic between official territory and Southwestern territory. That scale applies between the Mississippi River crossings, such as St. Louis, Missouri, and as far north as Dubuque, Iowa, for hauls west of the Mississippi River as far as El Paso, Texas. Then they said, we will let you have—some of these hauls in the Midwest are intermediate, so they made an adjustment and took a certain number of integers out of the scale so as to make an intermediate scale.

Then they said that the evidence relating to rate levels and other matters convinced them that the Mountain-Pacific carriers should have a higher level scale. So they increased the factors in the scale 10 per cent for Mountain-Pacific territory. The starting block in the Midwest is 65 units. The starting block—50-mile block—in Mountain-Pacific is 72 units. In the Midwest each 50 miles jumps 12 units; in Mountain-Pacific each 50 miles jumps 13 units. Now that is what they did.

Then they also said, we have to consider revenue needs. That is an intangible thing which cannot be evaluated [fol. 2071] to the dollar or to the penny. We have to also consider the fact that a division is a part of the rates. And the rate is made in accordance with certain principles.

And they pointed out that for more than forty years they had been modeling division scales on rate scales. And this scale they started with, the 29-886, was modeled on the class rate scale applying in the Midwest.

And they said no existing divisional scale, no existing cost scale, no other method or pattern suggested by the parties can be used as an exclusive guide. And they made the adjustments to their own scale prescribed ten years before, tested by ten years of actual use in the Midwestern territory.

Then when they referred to the importance of giving effect to the rate scale principle, they referred to a principle of transportation economics, which is that the compensation per mile must decrease with increase in haul.

In the class rate case, July 281 ICC at 236, which is incorporated in this record by reference, the Commission said that a rate scale reflects costs which have relation, direct relation, to distance and costs which have no relation to distance whatever—like executive salaries, general office expense, bond interest, income taxes, real estate taxes, solicitation expense. Those all have to be reflected in the rate scale. And finally that a rate scale reflects what is [fol. 2072] called an allowance in the nature of a standby charge for the privilege of the use of facilities involved.

The railroad has its facilities ready 24 hours a day to handle traffic, and an allowance is reflected in the rate scale for that purpose.

All of those things which are judgment factors have to be reflected in the division scale when you cut the rate in two parts—or three parts, whatever it is, whatever way you cut it—and the Commission did that based on judgment.

I close by calling attention to one passage in the B & O case in the 298 US where the Supreme Court, after stating there is no requirement that the Commission specify the weight given to any item of evidence or fact, or disclose mental operations by which its decisions are reached, further added:

"* * * useful precision in respect of either would be impossible."

Now, our friends say that language is no longer the law. It was written before the Administrative Procedure Act. But I respectfully submit that the court should not ascribe to Congress an intention in enacting the Administrative Procedure Act to lay down standards in respect of findings which the Supreme Court had previously said were impossible of fulfillment. You can't specify the weight given [fol. 2073] to these intangible and judgment factors. You can't specify the mental operations—I am very sorry, I am infringing on your time, Mr. Cerra. My time is up, sorry.

Further Argument on Behalf of the Defendants United States of America and the Interstate Commerce Commission

Mr. Cerra: If it please the court, I am Arthur J. Cerra, Assistant General Counsel of the Interstate Commerce Commission.

May I ask the court precisely the number of minutes I have remaining?

Judge Barnes: According to my computation you have eight, eight minutes.

Mr. Cerra: Thank you very much, your Honor.

I want to address myself initially to this question that Judge Mathes asked concerning the equalization of competitive gateways via the Rio Grande. This is a routing problem involving the competitive nature of the shipments, the competitive nature of the routes. The Commission didn't have any control over the shippers. Yet in its report it made specific findings permitting the carriers to—the exact words I am looking for here—they permit departures from prescribed divisions for the purpose of equalizing competitive gateways or routes. And it is also a matter of subdivisions.

[fol. 2074] So I think that perhaps with that thought in mind we can move along to some of these other points that I wanted to make. And these are primarily concerned with this court's inquiry as to what does that phrase of the statute mean, that Section 15(6) which says that the Commission shall give due consideration—among other things—to the amount required by the respective carriers to pay their operating expenses, taxes and a fair return on their property used in the transportation service.

Now, this court has asked several of my colleagues, doesn't this mean dollars and cents? And I would take that to mean absolute figures in terms of dollars and cents.

And my answer to that is it does not mean absolute terms in dollars and cents, but in some meaningful form on a relevant basis from which the Commission can determine, as in this case, which group of carriers vis-a-vis the other groups are in a better position.

Now, Mr. Trienens has told this court, in response to a question from Judge Crary that the dollar and cent figures as to the claimants' revenue needs was shown to the Commission in its record—and I think he cited an exhibit.

But whatever this exhibit shows, this Exhibit 275 that he referred to, whatever it purports to show, the Commis-
[fol. 2075] sion specifically rejected the Transcontinental lines' claim that they had greater revenue needs than the other groups of carriers. In its first report at 321 ICC at pages 70 to 71, the Commission said—I don't have time to read it, but I refer the court to that language in which they specifically rejected that claim.

Again, in the supplemental report at page 322 ICC—322 ICC at page 500, the Commission added that there is no greater need for betterments in individual areas. It specifically rejected their claim that they had greater revenue needs.

And the Commission found these revenue needs in what we consider to be the only meaningful terms, the rate of return which, if the court desires, are equivalent to dollars and cents figures.

Now Mr. Kaier has been over that and I don't have time to repeat the process on which you determine that. Mr. Eshelman has made that dissertation also this morning.

But these particular earnings of the railroads in the formula that the Commission has computed them on rates of return are standard. There hasn't been any Supreme Court case in which the court has required that the Commission find these things in absolute terms of dollars and cents.

In fact, they have accepted the equivalent of rates of return. This Act has been in being since 1920 and there
[fol. 2076] have been several cases in which the court has ruled. So we submit to the court that the Commission has considered, measured and found the revenue needs of the contending groups of carriers in the only meaningful form intended by the statute.

Now, the Supreme Court has observed in the New England divisions case that Congress intended that a method be pursued by which the task which it imposed upon the Commission could be performed. This is one of the things that the court had in mind—a method by which the task could be performed.

We cannot stultify the administrative process by making meaningless requirements that they do things when they have done them in an equivalent form.

Now, I have discussed the point that concerns the dollars and cents as to this phraseology of the statute which requires consideration of the amount of revenue required by the respective carriers to pay their office expenses, operating expenses, taxes and et cetera. But what about the findings as to dollars and cents amounts as to financial impact?

Well, plaintiffs cite no statutory provisions in which they allege the same meaningful operation to come from such as dollars and cents. But they say that it must be done if the Commission is going to know what they are doing.

[fol. 2077] Well, I think we have to recognize that the Supreme Court has repeatedly stated in these division cases that it is essential that divisions be designed to be fair in a colloquial sense.

Now, what does that mean, fair in a colloquial sense?

This means the divisions have to be fair, both as to traffic which produces a profit, as well as traffic that produces a loss. The divisions must return what is fair in the over-all when measured by the relative costs incurred in rendering the service. This is why the Commission always deals with aggregate revenues produced, as compared with aggregates of relative costs, to find out what the net results will be as to fairness.

Now, divisions operate in the future. You could have a finding in the future which would be theoretical as in dollars and cents. I am talking about absolute terms of dollars and cents. You could have a finding as the future that would be theoretical, and the reason I say theoretical is because—

Judge Barnes: There are so many factors—

Mr. Cerra: There are changing traffic patterns, there are changing rates, there are changing requirements of the shippers and it is just making an estimate. The Commission can make an estimate for the future. This is [fol. 2078] permissible now.

There are several Supreme Court cases permitting these estimates as to the future, the Detroit and Cleveland Navigation Company. I believe that is in 326 U. S.

The only meaningful way they can do it is to—let me backtrack a minute here.

Now, you could have a dollar-and-cents absolute figure as to the past, but there you are reflecting what occurred in the past and you are assuming it is going to continue in the future. This is why I say you can make the estimates as to the future.

Judge Mathes: Wouldn't it be practical for the Commission to find maxima and minima on these matters?

Mr. Cerra: I don't quite follow—

Judge Mathes: In other words, you say you can't get right down to 99 cents, but yet it is not less than so many cents or not more than so many cents. Can't that be done?

Mr. Cerra: Then again we would always face this problem, your Honor, in court, of saying, "Well, where in the world did the Commission get this from? It is some place outside the record. It is some estimate."

Judge Mathes: Is it more difficult than projecting an estimate as to what will happen in the future?

Mr. Cerra: Projection in the future is in equivalent [fol. 2079] terms in dollars and cents in findings that they made. You don't put your neck in a noose when you say it that way rather than it is going to be so many dollars. They come back and say, "How do you know it is going to be so many dollars? We think it is going to be so many dollars more. There is no way you can determine that."

But in this projection for the future let's examine what the Commission did here. The complaints were filed saying that the existing divisions were unlawful. The Commis-

sion makes a finding that the revenues from the traffic in question and the relative cost of the carriers in rendering the service, we know what that is. Based on the cost evidence the Commission finds the existing divisions are favorable to the plaintiffs, to an extent not justified by costs, and unfavorable to the intervening defendants in this case, as their revenues are too low in relation to costs.

Now, the Commission goes a little further. We have that initial determination. We have some kind of a comparable basis there. What do they do next?

They find that the Eastern and Midwestern lines in this case have greater revenue needs than plaintiffs, and they specifically reject plaintiffs' contentions that they have greater revenue needs than the Eastern and Midwestern lines, and this is to raise funds for additions, betterments [fol. 2080] and new equipment because of the expanding nature of the economy of the areas they serve.

What next happens? The Commission prescribed divisions for the East and the Midwestern lines and they find that these divisions are required in the public interest to maintain these groups in effective working condition. They find that the increases of the divisions to the Eastern lines are in a smaller proportion of revenues than the cost of rendering the service, and the Midwestern lines' increases are moderate.

We submit to the court that if the Commission was forced to make findings of the financial effect of divisions it described, in other than the quantitative measurements it has prescribed them, it would serve no meaningful purpose, unless there was a claim that this was going to be confiscation or so detrimental it was going to put the carriers out of business.

We don't have that claim here at all. So the statute, we think,—oh, incidentally, I might add that our contention is that the findings that have been made are equivalent to any finding of dollar and cents required. It is the only meaningful way the Commission can do it.

So we feel that the statute—when I refer to the statute I mean Section 15(6) as well as Section 8(B) of the Administrative Procedure Act—requires the Commission to do [fol. 2081] no more.

We feel that the Commission has made explicit explanation of everything that is required of it by the statutes. Nothing in common sense to me requires the Commission to make negative findings dismissing unsupported claims of alleged greater revenue needs or alleged detrimental effect of the new divisions, when the prescription of divisions they have made in their judgment merely returns to these carriers what justice and equity requires.

Judge Mathes: Wouldn't the Commission be obligated in any case such as this to make affirmative findings as to the factors specified by Congress in 15(6)?

Mr. Cerra: But it has, your Honor, in every respect it has.

What is being asked here is something more, something more. It is urged by the plaintiffs that this supposed requirement of these additional findings in concrete terms or constant terms or absolute terms is no empty requirement.

Well, by golly, if it weren't an empty requirement they can't show have they been hurt.

This situation with regard to this contention is very similar to what the court said in a recent divisions case in the Western District of North Carolina. It is a divisions case involving traffic between the L & N and the [fol. 2082] Southern. This is not a published report. I am sure Mr. Trienens has a copy of it. I might have an extra one for him.

I would like to hand up a copy of that opinion to this court.

This is what the court said there:

"With much ingenuity counsel for Southern has attempted to find questions of law where there are none. The Commission has acted neither capriciously nor arbitrarily nor has it misinterpreted or misapplied the law."

This is the same situation that can be found in this case. My time has about expired.

Judge Barnes: Yes, it has.

(Laughter.)

Mr. Cerra: On this occasion I am sorry I am a Washington lawyer.

Judge Barnes: We could suggest you are a good Philadelphia or Los Angeles lawyer.

Mr. Cerra: How about a California lawyer.

With that, your Honor, I would say this, that the Commission feels that what they have done in this case is not only fair, but they have met all the requirements of the statute and we believe that the Commission ought to be sustained.

[fol. 2083] I thank the court for its indulgence in hearing this long argument.

Judge Barnes: Thank you.

CLOSING ARGUMENT ON BEHALF OF PLAINTIFFS AND INTERVENING PLAINTIFFS AMADOR CENTRAL RAILROAD COMPANY, ET AL.

Mr. Trienens: The court has just been handed a copy of the opinion of a North Carolina court several months ago. The opinion was on review of an order written by Howard Freas of the Interstate Commerce Commission.

Judge Barnes: The dissenter here.

Mr. Trienens: He is the dissenter here. He knows there is an Administrative Procedure Act. He wrote a report in 319 ICC 634 that was upheld by the court.

In that report he found the financial effect of divisions that he prescribed, page 661. He related the divisions he prescribed to the standards of the Act.

You can trace through the ultimate order of that Commission written by Mr. Freas and trace it right back to the evidence, and it tells you exactly what standard it is designed to reflect and why it isn't designed to reflect other standards.

Judge Crary: Mr. Trienens, before you get started may I ask a question? I seem to be taking a lot of time asking [fol. 2084] questions and I don't want to encroach on your time, but the plaintiffs have not set up schedules of what they say these financial effects are, even based on their own theories.

Now, is that because it is impractical and too difficult to do? If it isn't, why haven't you given us some ideas by schedules and so forth as to what your contention is with respect to the effect of these financial—as to the financial effect and as to these issues, these first four issues we have been discussing at length?

I just throw that out and I hope you will cover it in your argument.

Mr. Trienens: I will cover it the first thing.

I do want to lodge with the court, if I may, the briefs before the North Carolina court, because that opinion just handed to the court is fairly cryptic.

The reason I want to hand the briefs in the case to the court, if the court cares to check, is that none of the issues raised before this court were before that court. They didn't even cite Section 8(B) in their briefs. The reason is that problem wasn't raised, the finding wasn't raised.

By reading that cryptic opinion, without any idea of it involving any issues we have, I think the briefs might be of some use to the court.

Judge Barnes: We will let you lodge them.

(Laughter.)

[fol. 2085] Mr. Trienens: When I spoke yesterday of not having a schedule I was speaking, I believe, with reference to the question of what was the effect of these divisions. Of course, we estimated them effective July 1, '63, when they would have been effective. I do not have figures outside the record as to what the current situation is. I didn't make any schedules from evidence outside the record.

Now, with respect to the record, the record contains ample evidence of all of the factors, the expenses, the

taxes, the property measured in various ways for various groups, and all these important individual railroads. That is in there. It is in there for all the years, it is in there for any grouping you want, any individual roads you want.

All you need is to decide what the fair return is, fair rate of return is, and you can calculate on a proper basis what the fair return is in dollars.

Judge Crary: Why didn't you compute under these new divisions what the rate was, based on these new divisions, so you can point out to us your position that it is unconscionable?

Mr. Trienens: To show it is unconscionable our position is—and bear in mind in computing how you define expenses, what the coverage is and matters that aren't covered in our Issues 1 to 4, we have quite a few disputes. [fol. 2086] In our Exhibit T-275 at line 5 we show that when you take into account what we think, what we believe to be the real true costs of running these railroads, what we think are the expenses and the fair return requirements, we show that as a matter of experience over the five-year test period we used that the net total dollars available to the stockholders of our roads were $45,000,000.00. That was all the principal Mountain-Pacific Roads. And relate that to what we have found off the record, of course, and off the record we found this $45,000,000.00, but there is no way of calculating it. They wouldn't take our exhibits on that. They wouldn't give us permission to do that with this radical change in divisions. That was the same amount of money.

Judge Crary: Suppose this order was made that they had to make these findings, how are you going to make them if you don't have the information?

Mr. Trienens: As to the financial effect they ought to take the data necessary to compute it. They either ought to prescribe the divisions, where it can be computed from evidence in the record, or they ought to take the detail which we offered to them and tried to get in the record, which would enable them to compute the financial effect

of any basis of divisions you apply. But they kept that out.

Judge Crary: Do you contend they ought to project [fol. 2087] these in the future and then apply the divisions on a projected basis? I am trying to find out just what your position is as to what they should do.

You said they should make these findings. Now, how should they make the findings?

Mr. Trienens: I will tell you exactly how I think they should.

Judge Crary: How you think they should. That is what I am interested in.

Mr. Trienens: They should take this evidence, which is admittedly in the record, which would enable them to compute the amount of revenue required to meet the carriers' expenses, taxes, and decide what the return ought to be for each of the groups and each of the carriers as to which there is a problem, in the light of the circumstances of those carriers, having the property base, compute what the fair return is in dollars, and that is the statutory requirement.

Then in order to determine whether the divisions they are prescribing are just, reasonable and equitable, in light of the statutory standard, namely, the amount of revenue required, find on the basis of evidence in the record, preferably relating to the same period of years they are talking about for the amount of revenue required, what those divisions would produce for the test year, so they [fol. 2088] could know whether the divisions they prescribe for the test year—I wouldn't use an abnormal year, but a year they estimated would be representative, relating to the future, so that they would know that the divisions they prescribed would enable the carriers to satisfy the amount of revenue required.

Judge Crary: What a fair return might be, you admit, might be nothing in dollars.

Mr. Trienens: Oh, no. I think a fair return is dollars.

Judge Crary: I know, but it could amount to nothing. When you consider the rate to be divided and you consider all of the necessary expenses and so forth, it could be that they would receive actually nothing by way of profit, isn't that true, and still be a fair return?

If nobody else is favored, now, that could result, because the B & O case says that the compensatory amount isn't to be concerned—we are not to be concerned with that unless there is some other group that is treated unfairly—I mean unless some other group is not treated on a fair basis.

Mr. Trienens: The B & O case reports about the non-compensatory, the confiscatory result. They are talking there about the problem of dividing a deficit. You haul a car of lettuce to New York and it is a deficit, everybody [fol. 2089] loses money.

The fact that you divide it fairly, everybody is going to lose money on that car because it costs more for everybody than the car produces.

Judge Crary: But suppose these fair returns, the composite of the fair returns, there isn't enough of the rate by the divisions to give a return to certain roads.

I am asking you, when you talk about a fair return I am assuming you are saying the fair return should be approximately so many dollars. It should be a certain per cent of the revenue over and above these expenses.

But isn't it possible the fair return so figured would not result in any profit and still be a fair return?

Mr. Trienens: It could be.

Judge Crary: That is what I am interested in.

Mr. Trienens: In this sense, that once the Commission finds what the expenses, taxes and a fair return would be for this carrier and that carrier and this group and that group, however they do it, it may be the divisions they prescribed, in light of that finding and in light of other findings, in light of other factors that they consider, won't produce it. But they have got to do it in light of finding what the revenues required are, or how else can they

know they are just and reasonable? That is our Issues 1 to 4 and that is all there is to it.

[fol. 2090] Now, I do want to say that the idea these rates of return, these percentages that were handed up here, the idea those are enough doesn't square with the statute.

You lay these ratios against the language of Section 15(6), it just doesn't match, it just doesn't show the amount of revenue required, it doesn't show what returns are regarded as fair. It shows what they happened to earn in those years.

Judge Mathes: Are you referring to railroads in a division as a group or individually?

Mr. Trienens: I will speak specifically of the separate problems of the individual roads, Judge Mathes.

Judge Mathes: Have you up to this point?

Mr. Trienens: No, sir. These standards I have spoken of I think apply whether the Commission deals with them in groups or deals with them individually. That I think is a separate question. My comments have been addressed to either way they might want to do it or might be permitted to do it.

I do want to comment that the rates of return do not suffice as a finding of what is fair. And even if these rates of return were all they said they are, even if they measure the amount, which they don't, the Commission still didn't find the financial effect even in those terms. So how could they have known these divisions they pre-[fol. 2091] scribed were just and reasonable, even on this rate of return?

Now, just as to what I hope is a procedural phase of this, Mr. Kaier said yesterday at transcript 153 that we had never made this point; that we never made it until after the March order of the Commission on reconsideration.

I note parenthetically that that is irrelevant as a matter of law because the statute says they have to do it. The

Commission squarely ruled on the merits of this statutory claim and held against it and it raises a clear issue.

It is also wrong in fact. We had shown our version of the supplement to the record and what we thought should be considered in determining the amount of the revenue required. We had asked that there be a flat percentage change in the divisions in our brief to the examiners.

Now, a flat percentage change, if you change the divisions 10 per cent and you know the revenues, you obviously know the financial effect. The examiners didn't do that. The examiners proposed these random per cents, not of a flat change or a prorated change, but these random per cents.

When that happened we stated at the first opportunity and in the first pleading before the Interstate Commerce Commission, namely, our exceptions, exactly the claim we are making in this court, and I refer specifically to page 80 and surrounding pages of our exceptions; our first [fol. 2092] pleading before the Commission. They had our position from the outset before this was ever taken to the Commission.

Now, there has been some talk about these findings, these Issues 1 to 4. Well, this New England divisions case, they say, that was a flat 15 per cent increase and they knew exactly what it did. The Commission found what it did.

They cite the B & O case. We have cited these cases in our brief. We have shown that factually they have never decided against us in this problem. It wouldn't matter if they had, actually, because those are pre-1946 cases. Pre-effective date of the Administrative Procedure Act.

Obviously, there were issues that the Commission could have been deemed to have considered. That was the problem Congress was dealing with. The Commission said, "Well, we considered all that." And Congress said, "Let's state it. Let's state the findings and material issues."

These cases that are pre-1946 just don't bear upon the point.

Judge Barnes: Do you have specific reference to proceedings in Congress or to reports?

Mr. Trienens: On the findings point, your Honor?

Judge Barnes: Yes.

Mr. Trienens: Yes, sir, we have the legislative reports underlying Section 8(B).

Judge Barnes: That is of the House of 1980, is that the [fol. 2093] one you have reference to in your brief?

Mr. Trienens: Yes, I have that at page 18 of our opening brief. I also have reference in our reply brief to the statement on the floor by the sponsor of the bill, at page 15 of our reply brief. That is 92 Congressional Records 5653.

And we also have the testimony of the Interstate Commerce Commission representative before the House hearings. That is at page 19, and at page 20 we cite the Senate report which rejects the claim that the Interstate Commerce Commission would be exempted from this Act.

The Colorado case assumes importance because it did apply the Administrative Procedure Act. It applied the Supreme Court decision saying that Act was to be taken seriously.

I would like to briefly review the reasons Mr. Kaier says the Colorado case is different, why it involves scales which affected long-haul and short-haul carriers. That is exactly the issues we have in Issues 9, 10 and 11.

Issue 11 is exactly the issue we raised in our brief, exactly the issue decided by the Colorado court.

Mr. Kaier says in Colorado the Commission didn't make cost findings. The Commission did find that the existing divisions were unsupported by costs and they found, just as they did here, that costs provided no helpful pattern for [fol. 2094] prescribing new divisions. The same thing they did here.

Mr. Kaier said in Colorado, that there the Commission considered the impact of divisions entirely from the view-

point of the Eastern lines. When you go to this confirming evidence they have to turn to, affirming the Commission's unstated prior judgment, it is in relation solely to this little sample and solely with respect to the Eastern lines, with no consideration as to what would happen to us. We bear the full brunt of what the Eastern lines would get, plus what the Midwestern lines would get out of that traffic, plus what the Midwestern lines would get out of Midwestern traffic. They considered it solely from the viewpoint of the Eastern lines, as to that evidence to which they were able to point. This is the very error found by the Colorado court.

I want to make it also clear that our importance, the importance we attach to the Colorado case is not because of the particular way that case arose. It is the standard that the court said should be applied.

The important thing is that the findings should relate the divisions prescribed to the standards of the statute.

Incidentally, that is Part B of the Colorado report. Part A dealt with the typical evidence rule in the terms of evidence. Part B dealt with the findings problem. [fol. 2095] The Commission didn't say, "Well, we will go along with Part A and forget Part B." They said specifically, "We are going to retry those issues in conformity with the opinion of the court, consistent with the views expressed by the court." We ask equal treatment.

Now, I would like to turn to the individual carrier aspect. Three counsel have been asked or addressed themselves to what case authorizes the Commission to disregard individual carriers and consider groups. In each case the New England division was mentioned. Here is what was said by Justice Brandeis in the New England divisions.

First he is going to state the claim that was made and tell what he did with it.

"It is asserted that the order is necessarily based—"

I am reading from 261 U.S., at page 196.

"It is asserted that the order is necessarily based upon the theory that under 15(6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void."

That is the contention. "Whether Congress did confer that authority we have no occasion to consider, because it is clear that the Commission did not base its order upon [fol. 2096] any such theory." That is the New England divisions.

The same Mr. Justice Brandeis in the Abilene case does define what power was conferred by Congress on the Commission, and it is that of determining with respect to each joint rate what division will be just. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers because the aggregate result of the movement of traffic on joint rates appears to be unjust. The Colorado case dealt halfway. But the New England case, the Abilene case, the Beaumont case traced them through, found they were consistent, found that the Commission was obliged to consider the effect of its order on individual carriers and found it could make findings in light of the Administrative Procedure Act.

[fol. 2097] We are not saying that the Commission has no power, no power to prescribe the route divisions, if it supports that power, the exercise of that power, with findings on the material issues of the revenues required, and the financial effect of its order on individual carriers that are affected by it.

The problem here, as we have said before, is the individual carriers. This isn't a flat percentage pro rata change. Individual carriers are affected disproportionately. It is essential to the integrity and validity of this order before this court that those findings be made.

Now, one other use was made of this little table which Mr. Kaier handed up on rates of return. He said that is the basis of the Commission's conclusion on revenue. Well,

the Commission must not have thought so because it went on page after page about other things. The Commission thought it necessary to deal with this problem that we say was our revenue problem, the problem of serving the growing West.

The Commission could have said, oh, well, rates of return—that solves everything. That is what you think from the argument. That isn't what the Commission did. They felt obliged to go much further to consider the problem, consider and deal with and write about our revenue need contentions.

[fol. 2098]. Well, the rate of return didn't brush them off. They brushed them off on passenger deficits. They said explicitly, when dealing with our basic revenue claim, this results from passenger deficits.

Now, I thought that was perfectly clear. But if it wasn't the supplemental report made it even more clear, that PR-130, the Commission says we regard passenger deficits as important in connection with the claimed revenue needs of the Transcontinental lines.

Now you will also note that these rates of return that Mr. Kaier said were so significant, they go back to 1946. Well, now, if you are worried about the situation toward the close of the record, and the current situation, why did they go back to '46? Why go back to the post-war, immediate post-war years?

Well, we suggested they use the most current three years as the basis, and the rate of return—even the rate of return we were lower during that period. Why didn't they use that?

Well, they tell you that PR-131, it is because of the passenger deficit. That was the basis they knocked out our rates of return even, as well as our claims based on our real revenue problem of serving a growing territory.

And I again point to PR-132 where they stated their conclusion as to the revenue need reasons for giving the [fol. 2099] Eastern lines money solely in terms of this freight carrier theory.

Mr. Kaier says, though, these passenger deficits are pertinent and relevant. But the elements are one. They can be relevant to allocations as between freight and passenger to get the freight costs.

We are talking about revenue needs, which is all we are talking about here. The Commission's use in connection with revenue needs. This talk about these allocations just is no answer. We say that there is no basis in the findings, no basis in the evidence for saying that these passenger deficits can be saved. There is no basis for finding our revenue needs as freight carriers, that we can carry on this freight business without incurring these common costs that are admittedly in the passenger deficit figures.

Our offer to prove the facts was conditioned, conditioned on the use, on any use of these passenger deficit theories. The examiner said our passenger deficit was excessive. The Commission said it was too high and practically verbatim used the theory, and we were denied a hearing on this charge that our passenger deficits were too high.

Now, Mr. Kaier, Mr. Belnap and Mr. Eshelman all say, why, these divisions were supported by costs. Transcript page 157, Mr. Kaier says the Commission didn't apply [fol. 2100] here a revenue need theory, it is all based on costs.

Well, that is not the order before this court. That is not the order Mr. Kaier is defending. The Commission foreclosed that order when it talks about the cost evidence in PR-74, and then said at the top of PR-75 that evidence—meaning the cost evidence—"that evidence however does not provide an acceptable pattern for readjusting the existing divisions which must reflect certain broader aspects of revenue need."

That is the order. That is what the Commission said about these divisions.

Whenever we talk about the revenue needs, they say those are based on costs. And when we talk about the costs they say nothing matters, because every issue is de minimis and every issue is non-prejudicial. The difficulty is catching up on some of this.

I might say, as a factual matter, that the very evidence, this little sample upon which Mr. Kaier relies to say that the Commission didn't give the Eastern lines any more than their costs, when applied to the actual division—I don't sanction this sample, but when you take a sample from the record and apply the divisions and compare it with costs, you find that the East got ten million dollars more than they would have if the divisions had been based on costs. And quaintly enough that ten million dollars is [fol. 2101] not back East or up in the New England states where we hear about these problems. The bonus is right in Detroit, right in the Group B-3, Pittsburgh. There is no sense to that at all.

Now, defendants handed up some charts yesterday. Mr. Belnap handed up two charts and Mr. Kaier handed up some charts. They are arguing that these present divisions are just too low, just—the present divisions are too low for them in the light of costs.

Now, I want to first say that these charts did not purport to defend the order before this court. The order before this court prescribed some divisions. They are the new divisions. Without findings of the dollar effect of these new divisions, how can you tell whether the new divisions are just and reasonable in the light of costs even as to the amount of revenue required.

One other thing about these costs and their relation. Now I am talking about costs which they purport to claim are the costs of the transcontinental freight traffic at issue. These charts purport to show only that the Eastern and Midwestern divisions are too low if—and only if—the Commission's cost determination is valid in all respects, is based on adequate findings supported by substantial evidence. Now that is Issues 20 to 29. Now these costs don't show anything unless you hold for them on each of the Issues 20 to 29, because those are the costs that are sub- [fol. 2102] ject to those errors.

The question was asked yesterday, well, what did the Mountain-Pacific line cost study show? I would like to

state for the record that the result of our cost study is shown in PR-23 in the last few lines. Our study shows that we were not getting anything more than the cost of this traffic—in fact, we were getting somewhat less. That is what we think the costs show.

Now, what the Commission did to those costs was two things. They first aggregated them. They didn't just mix the Detroit railroads together there as was suggested yesterday so as to raise the competitive factor. They smeared New York and Detroit all together. There is no comparative problem there. That is one thing they did, with no finding.

They then injected into this study of ours a series of substitutions in which they took these average costs of all freight traffic into the study which was designed to reflect the costs of the Transcontinental lines. And that is how they get the difference. That is how they get the whole difference.

These issues that we raised go to substitution, which accounts for the whole difference between our study and the study they say shows the present divisions are too low for them.

Now they say, well, sure, they did six things—and look [fol. 2103] at this one, it only involved a third of the difference; look at this one, it only involved a tenth of the difference. The six things they did account for the whole difference. So I don't think they can de minimis us out of each one of these issues and then rely upon the total result.

Now, we think all these cost errors were prejudicial. And I would like to talk on just one of them. I don't intend to go into the merits of any of them again. I want to show the context in which one of them arose—really in which all of them arose, in order that the court can see some of the things the Commission said that were unsupported by evidence were critical to the reasons.

I think these car costs and locomotive costs—I won't get into the technicality of them—but you have this sort of

situation, you have bought a Chevrolet and you hooked it to a trailer and you took it to Denver. Somebody else took a Chevrolet from the same manufacturer, hooked it to the same car and took it to Chicago. And another fellow took a Chevrolet and hooked it to a car and took it to Cleveland.

You got through and you got in a room and you said, well, we got $1,000.00 for that job. Let's divide it up.

And the Eastern line said, well, sure, let's divide it on [fol. 2104] costs. And incidentally our costs per mile for that same trailer and our costs per mile for that same Chevrolet are 30 or 40 per cent higher than yours.

You just come out of the mountains and they are going from Chicago to Cleveland and they said, well, our costs are 30 per cent higher.

And you say, well, now, how come?

And they say, well, that is our average cost.

And you say, well, sure, that is your average cost. But 95 per cent of the business is doing something else, local business doing non-transcontinental business. Let's talk about the cost of running this Chevrolet that you attached to this trailer.

Well, we went through the whole year asking this question. And the first time we asked it the witness said, well, I will think of something. And at the last here he thought of something. He says, I will tell you why it costs more, because when I haul it, I haul it between shorter engine districts and I am going to measure them and I am going to show you that they are shorter.

And that was the only reason given. Eastern lines promoted it. The Commission picked it up. They said there is the reason, there is a reason, and, by golly, that is a good reason, it relates to the transcontinental traffic. And they used it for locomotive costs and they used it for car [fol. 2105] costs.

Now we come and we say, well, look at the cross examination, the witness committed an error that is not supported by substantial evidence. Do they dispute us on that? Oh, no, they don't even make a finding here suggesting that is

supported by substantial evidence. Mr. Belnap said, well, that is lagniappe.

Well, that is the same sort of thing that happened throughout these costs. Every time we got right up, right up to the reason why, the Commission will give a statement—or some will give none on findings—some they will give none, no findings. Some they give a statement, maintenance of way, car costs, locomotive costs. We say the statement isn't supported by substantial evidence. And that is the issue. Is it or isn't it? They don't even claim that it is.

One other error in there that is a legal conclusion. They said, we haven't got any power under Section 21, or they say, our power is not clear to ask them to produce data. Well, is that just something the court will never get to, as Mr. Belnap suggested? We asked for this data, Exhibit T-616, we were partners in this operation. We said, well, you have got the data, come forward with it.

And then we said to the Commission, there are some cases that say that this isn't—you are not passive, this [fol. 2106] isn't just a squabble between some railroads, this is a problem of public interest, take some interest in it and produce the data if they won't come forward, have it produced.

There are cases, three-judge court cases in this District, Judge Solomon's case up in Portland we cite, that said the Commission has the duty to be sure that the best evidence is brought forward by the carriers.

So what was the Commission's answer to that? Right on the first page of their supplemental report? Our power is not clear. Nobody comes in and tries to defend that as a legal conclusion. It can't be ignored, that is what they said.

Now, we think all of these cost issues are clearly prejudicial.

I have just one other comment I would like to make, and I want to explain here why I am not arguing something. I was chided several times yesterday for not arguing the

justice of the present divisions, for not defending the present divisions.

I would like for the court to know that I would love to do that. Not in those terms, however, I wouldn't love to defend the present divisions as such. I would love to show the present division in Detroit is too high for the East. I would love to show that we are entitled to money based [fol. 2107] on costs, based on the actual revenue. I would like to do that.

But we are here on judicial review. I was told, when I was tempted to make arguments that went to justice, I was told by Homer Mitchell that he would run me out of town if I started arguing justice in this court. Justice is for the Commission. 15(6) says so. The court is interested in legal error. And he is right.

The Supreme Court said it in Chenery, and it said it again in the Burlington Truck Lines case, that neither the court nor counsel should go into matters that are within the discretion of the Commission. Deal with the legal issues, because if the Commission's findings are not supported or they didn't make adequate findings you would have to go back. Deal with the legal issues. And that is what I have tried to do.

Now there is one other feature of Mr. Kaier's claim that the present divisions are grossly unjust to his lines. And it is perhaps a detail but I think it is one that I don't want to escape unnoticed. He says—and you will notice from the beginning of his argument—these are missionary divisions, 50 per cent higher per mile, there is a big mileage inflation. That was the opening argument.

The thing about that for the East is that it isn't so. The [fol. 2108] Commission found at PR-7 that the Eastern lines under the present divisions are getting the same percentage of the money as they are performing of the miles. There is no mileage inflation for the Western lines in the present divisions. There just isn't any and the Commission found that.

As I understand the real point, the real emphasis Mr. Kaier was trying to make, it was that all of our claims,

all of our legal issues should be ignored by the court, or brushed over lightly, or dismissed with a wave of the hand. Why? Because those are mere editorial defects. That is the characterization of all of our claims.

I won't try to demonstrate why I think that is grossly wrong as to each one. I do want to say that that argument is not open to Mr. Kaier or to the Eastern lines.

Mr. Hamilton reminded you this morning that we signed a list of issues remaining in controversy, and no others. And I respectfully ask the court to pay particular attention to Issue No. 30.

Now, this is not our issue, I didn't argue this yesterday because it is not my issue. This is a defensive issue. And the issue is whether, if the Commission is found to have erred with respect to any matters in Issues 9, 10, 11, 12, 16, and 20, 22, 24, 25, 26, 28 or 29 such errors were prejudicial within the meaning of Section 10 of the Administra-
[fol. 2109] tive Procedure Act and other than de minimis.

Now what that means is—and I have argued that each of those was prejudicial, we are talking about the Section 21 problem, the car cost problem, we say they are prejudicial. But what I want to emphasize in closing is that as to each of the other issues, 1 through 8, 13, 14 and so forth, each of the other issues, there is no question remaining before this court as to whether they are prejudicial. If there is error, there is reversible error. And that is true of practically every issue Mr. Kaier was assigned; it is true of the amount of revenue required and the financial effect, it applies to these divisions pulled out of thin air for the East, it is applied to this unlawful, arbitrary passenger deficit, it applies to empty return ratios, general purpose and refrigerator.

If the Commission is wrong on these issues as stated, it is not open to defendants to say now that the error was not reversible, because that no longer remains an issue.

I thank the court very much for its patience. And I would also like to thank particularly the reporters to whom we have subjected a rather hard burden and they have borne up under it splendidly and I thank them very much.

Mr. Johnston: If the court please, before the court adjourns may the intervening defendants, the Eastern and [fol. 2110] Midwestern Roads, submit to the court if they so desire additional references of the legislative history of the Administrative Procedure Act, in addition to those that were submitted?

Judge Barnes: If you think it is necessary. I think there was merely a reference as to the Congressional Record and certain testimony in the Senate Report. Now, if you think there is something additional, there may be some other hearing or something of that kind—

Mr. Johnston: Yes, sir.

Judge Barnes: I think we have a pretty good record at this point.

Mr. Johnston: Well, they may or may not wish to do so.

Judge Barnes: All right.

Mr. Johnston: But we ask permission if they so desire.

Judge Barnes: All right. They should be submitted right away.

Mr. Johnston: Yes, your Honor.

Judge Barnes: Within 24 hours.

Mr. Johnston: Yes, your Honor.

Judge Barnes: Just a reference, no argument, just a reference.

All right. Thank you, gentlemen, for cooperating with us [fol. 2111] and trying to reach an end of the argument in a very interesting and difficult case.

We will take an adjournment until further call of the court.

(Whereupon at 10:45 o'clock a.m., Friday, November 20, 1964, court was adjourned.)

[fol. 2112] Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 2113]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

MEMORANDUM OPINION AND ORDER RE PREPARATION OF JUDGMENT—January 25, 1965

This is an action to enjoin and set aside orders of the Interstate Commerce Commission (hereafter referred to as Commission) of March 21, 1963, as amended by order of June 20, 1963, and supplemental order dated December 31, 1963, which orders prescribed new divisions of joint rail rates on transcontinental freight traffic. The Commission's order of March 21, 1963, provided for new divisions of joint rates on Eastern and Mountain-Pacific transcontinental freight traffic substantially more favorable to the Eastern lines than the present divisions. New divisions were also established on transcontinental traffic originating and terminating in Midwest territory and for Midwestern lines participation as intermediate carriers of traffic to and from Eastern (official) and Mountain-Pacific territory. These divisions benefited the great majority of [fol. 2114] Midwestern lines.

[File endorsement omitted]

In April, 1954, most of the Eastern lines filed a complaint before the Commission seeking to increase their divisions of transcontinental freight revenue on traffic moving between stations of the Eastern lines in Eastern territory and stations in the eleven western states of Mountain-Pacific territory. The other Eastern lines now before the court filed similar complaints shortly thereafter.

A group of Midwestern lines filed a separate complaint before the Commission against Mountain-Pacific lines and Eastern lines which brought into issue the lawfulness of (1) their divisions of joint rates between Midwest territory and stations in the western part of Mountain-Pacific territory; and (2) Midwestern lines subdivisions of the primary western divisions of joint rates between Eastern territory and said stations in Mountain-Pacific territory as to which the Midwestern lines performed intermediate service.

The Mountain-Pacific lines filed answers and cross-complaints to the complaints of the Eastern and Midwestern lines. Hearings, which terminated in the Commission's said 1963 orders, began April, 1955. All groups offered evidence based on their studies and claims re costs.

The *present action* was filed by plaintiffs, seven principal western roads and four smaller roads serving Mountain-Pacific territory, on June 23, 1963. A complaint in intervention was filed by forty-five additional roads serving Mountain-Pacific territory. All are referred to here as Mountain-Pacific lines. Also intervening were the People of the State of California and regulatory agencies of ten western states and the St. Louis-San Francisco Railway and Missouri-Kansas-Texas Railroad, Midwestern lines [fol. 2115] whose revenues were reduced by the Commission's order.

The present divisions of joint rates on transcontinental traffic were established by agreement which has not been approved by the Commission. These revenues account for about 50% of the total freight revenues of Mountain-Pacific

lines, 15% of that of Midwestern lines and about 6% of that of Eastern lines.

On June 27, 1963, the court issued a Temporary Restraining Order pending hearing on application for Interlocutory Injunction, and this three-judge court, on August 3, 1963, after hearing, entered an Interlocutory Injunction restraining enforcement of the new divisions order until after hearing by the Commission of petitions for reconsideration.

The Commission filed a "Supplemental Report" and order on December 31, 1963, denying all petitions for reconsideration which had been filed by plaintiffs and intervening plaintiffs (hereafter referred to as plaintiffs). The new order made some minimal changes in the order of March 21, 1963. On March 23, 1964, this court entered its Judgment for Interlocutory Injunction, on Supplemental and Amended Complaints previously filed, enjoining the enforcement of the Commission's order of December 31, 1963.

The statutes primarily involved are Section 15(6) of the Interstate Commerce Act [49 U.S.C. 15(6)] and Sections 7(c), 8(b) and 10 (e) of the Administrative Procedure Act, enacted in 1946, [5 U.S.C. 1006(c), 1007(b) and 1009(e)]. Section 15(6) provides that in prescribing divisions the Commission is obligated to give due consideration, "among other things," to the following factors:

(1) "(T)o the efficiency with which the carriers concerned are operated,"

[fol. 2116] (2) "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation,"

(3) "the importance to the public of the transportation services of such carriers,"

(4) "and also, whether any particular participating carrier is an originating, intermediate, or delivering line, and"

(5) "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rates, fare or charge."

The numbering of the items to be considered is ours.

As to paragraph (1) of 15(6) above, the Commission concluded that none of the contending groups of carriers had been operated either more or less efficiently than another, and as to paragraph (3) of 15(6) above, that there are no differences in importance to the public of the services of the three groups of carriers.

Section 8(b) of the Administrative Act [5 U.S.C. 1007(b)] provides in part:

> "* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

[fol. 2117] Section 7(c) of the Act [5 U.S.C. 1006(c)] provides in part:

> "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

Section 10(e) of the Act [5 U.S.C. 1009(e)] provides in part:

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, * * * and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside any agency action, findings, and conclusions found to be

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; * * *."

The interpretation of Section 15(6) is the subject of the major dispute in the instant case. Plaintiffs urge that the Commission is required to consider and to make specific findings as to each of the five factors set forth in Section 15(6), enumerated above. Moreover, they urge that the Commission is further required, by the provisions of Section 15(6), and as well by Section 8(b) of the Administrative Procedure Act, to find:

(1) The dollar amount of revenue required by each individual carrier involved;

[fol. 2118] (2) The financial effect of the prescribed divisions on each individual carrier involved; that is, the extent to which the prescribed divisions will produce the dollar amount of revenue required by each individual carrier involved.

The "findings" made by the Commission following its report of March 21, 1963, are as follows:

"Findings

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the

Missouri-Illinois Railroad Company) and in No. 31503 (Sub-Nos. 4 and 5), on the one hand, and the defendants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 1 would be those set forth in appendix B hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, as between the complainants in No. 31503 (Sub-Nos. 1, 2 and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divi-
[fol. 2119] sions in lieu of those referred to in finding 3 would be those set forth in Appendix C hereto.

The hearing examiners' rulings on evidence are affirmed, for reasons stated in the recommended report.

An appropriate order will be entered."

The Commission bases its conclusion that the Eastern and Midwestern lines should receive larger divisions of joint rates on the ratio of past revenues received from all services to total cost of services. Plaintiffs object to the Commission's method of determining costs because it failed to use certain adjustments suggested by plaintiffs in the Rail Form A formula used. The Commission used average costs of all freight traffic, not the costs of transcontinental freight here in issue. This, plaintiffs urge, is in violation of the Acts involved because the Commission failed to require Eastern and Midwestern lines to produce data in their sole possession showing their actual costs, and the

Commission therefore failed to make required findings and conclusions, with respect thereto, supported by substantial evidence. Plaintiffs also contend the Commission refused to make essential findings and conclusions as to the reasonableness of the particular percentage divisions prescribed for Eastern lines and that the divisional scales prescribed for determining the divisions of Midwestern lines are not supported by "rational findings or substantial evidence."

With respect to the Commission's treatment of "revenue needs", plaintiffs say it disregarded *passenger deficits* and treated Mountain-Pacific roads "as freight carriers", whereas Section 15(6) requires revenue needs be determined with respect to *all* transportation services, and that no findings were made in support of excluding passenger [fol. 2120] deficit in determining revenue needs, in violation of Section 8(b) of the Administrative Procedure Act.

The parties appear to agree that the prescribing of divisions involves the exercise of judgment and that the Commission shall have broad discretion in the exercise of its judgment, that it need not specify the "weight" it attributes to various items of evidence and that its evaluation of the importance of the various factors is peculiarly within the purview of the Commission. See *Boston & Maine Railroad* vs. *United States,* 208 F. Supp. 661, (D.C. Mass. 1962), affirmed 371 U.S. 26. At page 670, the court states:

> "The Supreme Court in Universal Camera Corp. v. National Labor Relations Board, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456, has interpreted section 1009(e) to require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence, that is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It has further been held that the Administrative Procedure Act has not altered the rule of administrative finality. (Citing cases) The courts will not examine the findings of fact further than to determine whether there

was substantial evidence to sustain them. (Citing cases) If the evidence was substantial, then the Commission alone is authorized to decide upon its weight or the significance of the facts. Baltimore & Ohio R. Co. v. United States, 1936, 298 U.S. 349, 358, 56 S.Ct. 797, 80 L.Ed. 1209. The Commission's order is the [fol. 2121] product of expert judgment which carries a presumption of validity. 'And he who would upset the * * * order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' (Citing cases.) The administrative body was created for the purpose of using its judgment and its knowledge. (Citing cases.)"

The court goes on to observe that the "expertise" of the Commission is not sufficient by itself but that findings supported by substantial evidence are required. In commenting on the function of the court, it is stated at page 671 of the opinion:

"The function of the court is to review the administrative action, not to determine whether the 'court on the evidence would have reached the same result as did the Commission.' (Citing cases.) The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body. (Citing cases.)"

The court also observes at page 671:

"It is to be noted that the Commission 'is required to make not only findings that support its decision * * * but also findings that are intelligible and complete.' Concurring Opinion of Mr. Justice Douglas in United States v. Drum, 82 S.Ct. 408, Jan. 15, 1962."

Mississippi River Fuel Corp. vs. *F.P.C.*, 163 F. 2d 433 (D.C. Court of Appeals, 1947), was a rate case before the

Federal Power Commission on a petition to review and set aside its order. The court, after stating at page 439:

> [fol. 2122] "The Commission has wide power in the selection of formulae for the ascertainment of costs."

and

> "It is not the function of the courts to select formulae in these matters."

observes:

> "The Congressional provisions extend to complicated, difficult matters as well as to simple questions. The courts cannot evade their responsibility merely because the subject matter is obscure. And neither can they be required to probe the minds of the agency for unfound facts or unexpressed reasons. The coordination of the two functions of administrative discretion and judicial review requires that the facts upon which the discretion is exercised, and the reasons, be clearly and completely stated. When the matter is complicated, the necessity is greater."

There is no question but that whether the new divisions are just, reasonable and equitable is for the Commission, not for the Court. But it is equally clear that, in prescribing the divisions, the minimum duty of the Commission is to give due consideration to each of the five factors the Congress has listed in Section 15(6). Furthermore, although the Commission has broad discretion in the matters involved, such discretion can never serve as a substitute for the "findings and conclusions, as well as the reasons or basis therefor", required by Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)], or for the clarity of findings required by that Act.

Plaintiffs assert that Section 15(6) requires findings [fol. 2123] showing determination of revenue needs in terms

of dollars as to *individual carriers* and consideration thereof in prescribing new divisions, whereas defendants contend the provisions of Section 15(6) require determination of revenue needs only as to the *carrier groups* and not individual carriers and that such needs may be in terms of rates of return and need not be determined dollarwise.

In considering what Congress intended by the provisions of Section 8(b), as to necessary findings and conclusions, this court concludes that it is not the duty of the court to evaluate each bit of evidence and determine whether the Commission has drawn the proper conclusion therefrom. In this case the court has reviewed the portions of the record cited by the parties as required by above noted Section 10(e). The Commissioners are experts and their stated opinions, as to facts where based on the evidence, are sufficient to support their findings. Whether there is sufficient evidence for the Commission to arrive at the costs of service, and the data and information and method used, is within the discretion of the Commission, absent an abuse thereof. [§ 10(e), 5 U.S.C. § 1009(e).]

It is to be noted that the Administrative Procedure Act was enacted in 1946 and that the reason for such legislation appears, as stated by Congressman Walter on the floor of the House [92 Congressional Record 5653 (1946)], to be to insure a determination by the Commission in a rate case of the issues of law, fact and discretion, and that "the mere parroting of findings or conclusions in the words of the statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirement of this Section unless both the statute and issue were very narrow indeed." The United States [fol. 2124] Supreme Court in *Burlington Truck Lines* v. *United States,* 371 U.S. 156 at 167, states:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can be-

> come a monster which rules with no practical limits on its discretion.' *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.,* at 91. And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197."

As to the revenue needs of the carriers concerned, the Commission must of necessity, in order to comply with the Congressional mandate of Section 15(6), give due consideration to the amount required to pay their respective "operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation." Even though the Commission has broad discretion as to the facts it considers in arriving at conclusions as to the five requirements of Section 15(6), and in the evidence necessary to establish the factors deemed relevant in the making of new divisions, the law nonetheless demands [fol. 2125] that the new divisions be just and reasonable. And while the justness of the divisions is for the Commission in the first instance, the Court must be able to determine from the findings, conclusions, and orders of the Commission, whether the mandate of the statute involved has been met. It appears to the Court that, as to this particular factor, the mandate of Section 15(6) requires a finding in terms of dollars ("amount"), and that the Commission must also find the dollar amount of return to the carriers resulting from the new divisions, in order

to arrive at the required determination as to whether the new divisions are "just, reasonable and equitable"; and to enable this Court to review the adequacy of the findings to support the Commission's determination.

Regarding the need to make findings of the financial effect of the divisions, see *Chicago, Milwaukee, and so forth, Railway Co. v. Illinois,* 355 U.S. 300 at 309-10, footnote 8 (1958), where the United States Supreme Court, in affirming an order of the District Court remanding the case to the Commission for further findings, said in footnote 8, page 309-10:

> "It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is."

This court does not conclude it is required to determine what evidence the Commission must consider and weigh in complying with each requirement for the prescribing of new divisions, nor has the court the power to substitute its fact appraisal for that of the Commission, but once the necessary factors are determined there must be findings which disclose that the financial effect of any new [fol. 2126] divisions as to each carrier involved has been considered by the Commission in order that any reviewing court may be enabled to determine if the statutory requirements have been met by the Commission.

The issue of whether the Commission, in prescribing new divisions, must, pursuant to the provisions of Section 15(6), consider their effect on the individual carriers involved or only the groups of carriers concerned is one of major importance. The defendants urge that the Commission need only consider the justness of divisions as between the groups and that the equitable *subdivision* of the primary division of transcontinental freight revenues as between the lines in each group is not the concern of the Commission at this time but that any carrier who may not receive a fair share under the subdivisions made as between the

carriers in a group may in due time take its case to the Commission. Plaintiffs contend that the Commission, in determining the divisions between the groups, must consider the effect on the individual carriers. As noted above, Section 15(6) requires the finding of the amount of revenue required to pay operating expenses, and so forth, "of such carriers."

The case of *Atchison, Topeka and Santa Fe, et al.* v. *United States,* et al., 225 F. Supp. 584 (D.C. Colo. 1964), concerned an order of the Commission establishing divisions of joint rates for railroad freight in eastern-transcontinental inter-territorial traffic. The District Court held that the Commission improperly found presently existing divisions to be unlawful and that the new divisions established by the Commission were unlawfully prescribed. The case was remanded for proceedings consistent with the opinion. The court states, at page 606:

> "From the general tone of the Commission's report, [fol. 2127] it cannot be concluded that the Commission did consider substantial evidence of revenue needs of *all* the parties, either as groups or as individuals, for the report shows only a consideration of the revenue needs of the eastern lines, and even then not all of the eastern lines' needs were in evidence on an individual basis. Since the 28277 scale principally affects those lines with shorter movements in Official territory, it would not be unreasonable to require the Commission to show some evidence of the revenue needs of these lines; and some indication that the Commission considered the principal effect of the 28277 schedule on particular transcontinental lines."

In holding the Commission failed to observe the standards of Section 15(6) in making its findings, the court says at page 607:

> "We think that the requirement should not be relaxed here, for the necessity for us to determine whether

> the Commission exercised its discretion within the bounds of 'due consideration' to efficiency, revenue needs, public interest, and any other facts entitling one carrier to a greater or less proportion of a joint rate, is as great under Section 15(6) as it is to determine the bounds of 'public convenience and necessity' under Section 207(a)."

The "typical evidence rule" was considered at length by the court in the Santa Fe case, supra. After noting the evidence before the court in the New England Divisions Cases, 261 U.S. 184 [66 I.C.C. 196 at 201], the court, in [fol. 2128] the Santa Fe case, states at page 591:

> "It goes without saying that the Commission was not obligated to consider every last rate and division of every carrier; but it was obliged to do *something* more than consider the aggregate impact on the groups of railroads of a given formula for dividing joint rates as between the groups."

Thereafter the court quotes from the opinion in the New England Divisions Cases re the requirements of the typical evidence rule and then states the rule at page 592, as follows:

> "The Commission is merely required to have before it, and to consider, and to some extent to rely on representative evidence relating to particular rates and divisions of particular carriers; but, even when the evidence is based merely on a representative sample of all relevant traffic moving during a certain period, it must relate to particular rates and divisions of particular carriers. Obviously, evidence which is based on all traffic moving during a certain period must also relate to particular rates and divisions of particular carriers."

The typical evidence rule does not operate to excuse failure to find that the divisions are just, reasonable and equitable not only between the groups of carriers involved but also as to each individual carrier in each division. Referring again to the Santa Fe case, supra, the court, at page 595, in speaking of the use of aggregate data, states:

> "Before it relies on average or aggregate data, the Commission must make sure that the divisions for- [fol. 2129] mula under consideration (although seemingly just and equitable when viewed in terms of its impact on a group of railroads as a group) has not been constructed in such a way that its impact on any particular division of any particular rate as applied to any particular carrier is unjust."

Further, at page 596, quoting from Beaumont, etc. Ry. Co. v. United States, 36 F. 2d 789 (D.C. Mo. 1929), affirmed 282 U.S. 74:

> "'But it need not under all circumstances take specific evidence as to each rate of every carrier. When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories, the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to *justify the necessary findings and the order in respect* of each rate.'"

Continuing at page 597:

> "The defendants' suggestion that the requirements imposed by the typical evidence rule no longer obtain is unwarranted. It is said that the decision of the Supreme Court in the case of Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed.

1209. (1936) has vitiated the requirement that evidence representative of particular divisions of particular rates of particular carriers must be considered by the Commission in a divisions case. Such a contention is without merit."

[fol. 2130] The case of *Baltimore & Ohio R. Co.* vs. *U.S.*, 298 U.S. 349, is discussed by the court in *Santa Fe* vs. *U.S.*, 225 F. Supp. 584, supra, at some length. At page 598 it observes that the issue in the Baltimore & Ohio case before the Supreme Court was whether the divisions and rates established by the Commission were confiscatory, pointing out, however, at page 598 of its opinion:

"In the proceeding before the Commission, however, there was no issue with respect to whether or not the level of the rates established was confiscatory."

At page 599, the Colorado court, after quoting from the opinion in the Baltimore & Ohio case, says:

"It is, rather, the Commission's function to examine the divisions of rates which currently obtain (assuming them to be non-confiscatory) and determine, from an examination of the particular divisions of the particular rates in question between particular carriers, whether the division is, in the broadest sense, 'fair.' B & O, whatever else it stands for, certainly does not stand for the proposition that the Commission, in prescribing divisions of joint rates, need not take notice of what those rates are."

True, the court there was focusing on the determination of the unlawfulness of the *present* divisions but it is reasonable to assume that the same rules would apply in determining the fairness of new divisions. We are to have in mind, in the case at bar, that the divisions of joint rates are concerned and not the determination or the propriety

of the amount of the joint rates involved. At page 599, [fol. 2131] the court, in the Santa Fe case, continues:

> "Moreover, there is no substantial showing that the Commission had considered evidence of any specific rates and divisions."

After observing that there may have been "data respecting the particular rates applicable to carriers who are here parties plaintiff available to the Commission", the court says that that data was pre-war and there was no reason to assume that that information had "any great bearing" on the present divisions of "particular rates" applicable to the transcontinental western lines who were parties plaintiff to the action and that there was no statement by the Commission that it did consider the evidence, and on page 600 the court observes:

> "To the contrary, there is a statement, a wholly erroneous conclusion of law, that it was not obliged to consider any evidence showing specific rates. In light of the absence of the one statement and the presence of the other, we are not warranted in assuming that the Commission did consider such evidence. * * * In the aggregate the impact of the 500-A schedule may indeed be unjust, but the Commission has not made the required comparison of aggregate traffic evidence leading to that conclusion with evidence representative of particular divisions of particular rates which would warrant our endorsement of the action which the Commission has taken in declaring the 500-A schedule unlawful."

Defendants point out that the New England Divisions Cases, 261 U.S. 184 (1923), hold (pages 201-202) that the Commission's divisions are not invalid unless they prescribe [fol. 2132] the proportion to be received by each of the connecting carriers. This ruling shows that subdivisions

of primary divisions need not be made "if the real controversy is merely how much of the joint rate shall go to carriers east of the Hudson River and how much to carriers west * * * " (page 202, New England Divisions Cases), but the case does not hold that the needs of individual carriers need not be considered in determining the primary divisions involved. This same conclusion may be said to apply with respect to the rulings of the United States Supreme Court in *United States* vs. *Abilene & Southern R. Co.*, 265 U.S. 274 (1924), and *Beaumont, S. L. & W. R. Co.* vs. *United States*, 282 U.S. 74 (1930).

There is always the question of just how much reason the Commission must set forth in support of its methods of determining necessary elements involved. The reviewing court must satisfy itself that the bricks (elements) which go into the structure, to wit, the Commission's divisions, are in such form that the court can ascertain whether the bricks used are those required by law. This fact is recognized by the statutory requirements and cases discussed hereinabove, and the necessity of findings as to the revenue needs of and the financial effect of the new divisions on each carrier involved appears to the court to be well established.

Justice Cardozo, in setting aside an order of the Commission in *United State* vs. *Chicago, M. St. P. and P. R.*, 294 U.S. 499 at 510-511 (1935), expressed the standard of judicial review as follows:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. . . . The difficulty is that it has not said so with the simplicity and clear-[fol. 2133] ness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*,

> 282 U.S. 74, 86; *Florida* v. *United States*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider. Specific findings of the propriety of the use of information which the Commission, as experts in this field, considers to be sufficient and adequate re pertinent elements are not necessary. To require same would be to compel the Commission to justify each method and all facts considered in arriving at every factor involved in the making of new divisions. We hold this would exceed the requirements of Section 8(b) of the Administrative Procedure Act. The economic regulation of business is not susceptible of the same degree of definiteness as commercial law. Once the required factors are determined by the Commission, it must, however, apply them in a realistic fashion in drawing its conclusions as to just, reasonable and equitable divisions.

Defendants take the position that the Denver & Rio Grande, Missouri-Kansas-Texas and St. Louis-San Fran- [fol. 2134] cisco Railroads have waived any objections to losses resulting from the new divisions. The court concludes that there has been no intentional relinquishment of a known right on the part of any of these roads and that none of them waived any right to object to losses resulting to them from the new divisions.

Divisions in general, defendants urge, are made on the basis of "rate of return" figures which are equivalent to divisions in terms of dollars. The court concludes that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as they

do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions. The court further concludes that to comply with the provisions of the sections of the Interstate Commerce and the Administrative Procedure Acts, cited and discussed hereinabove, the Commission is required to make affirmative findings which disclose that the requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups; that findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required; that the findings show that in the prescribing of just and reasonable divisions the Commission has considered how said divisions affect the individual carriers with respect to [fol. 2135] the factors required to be determined by Section 15(6); and that the findings further show that, as required by Section 15(6), the Commission has considered the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits.

The court has discussed a majority of issues 1 to 19 of the 30 issues involved, as submitted by the parties, and in view of the conclusions reached it is unnecessary to discuss issues 20 to 30. However, no inference is to be drawn that the court is of the opinion that the issues 20 to 30, or any other numbered issues not discussed in this opinion, are of the nature it would be required to decide should they be raised at some future time.

By reason of the insufficiency of the Commission's findings and conclusions, as stated above, the Commission's orders of March 21, 1963, as amended, and December 31, 1963, will be set aside, and the cause will be remanded

to the Commission for further proceedings consistent with this opinion.

Any order which might hereafter be made by the Commission in the proceedings under review or new proceedings would be subject to challenge and to injunctive relief if the Commission failed to act in accord with the statutory requirements. *Cantlay & Tanzola* vs. *United States,* 115 F. Supp. 72 at 84 (D.C. S.C. Cal. 1953), and 28 U.S.C., Sections 1336, 2284, 2324 and 2325. In the circumstances, the matter of injunctive relief herein becomes moot.

This opinion shall serve as Findings of Fact and Conclusions of Law to the extent required by Rule 52(a), F.R.Civ.P.

Counsel for the plaintiffs are requested to submit Judgment setting aside the Commission's orders and remanding [fol. 2136] the cause to the Commission for further proceedings. This memorandum opinion is not a final Judgment.

Dated: January 25, 1965.

Stanley N. Barnes, United States Circuit Judge;
William C. Mathes, United States District Judge;
E. Avery Crary, United States District Judge.

[fol. 2137]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al., Defendants.

OBJECTIONS, AND GROUNDS THEREFOR, OF INTERVENING RAILROAD DEFENDANTS TO FORM OF JUDGMENT SUBMITTED BY PLAINTIFFS AND INTERVENING PLAINTIFFS AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Lodged February 3, 1965

[fol. 2138] Come now intervening defendants The Baltimore and Ohio Railroad Company et al., intervening defendants The Akron Canton & Youngstown Railroad Company et al., intervening defendants Chicago and North Western Railway Company et al., and intervening defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter collectively referred to as "railroad defendants"), and present the following statement of objections and grounds thereof to the form of judgment submitted by plaintiffs and intervening plaintiffs Amador Central Railroad Company et al. (hereinafter collectively referred to as "plaintiffs"):

[File endorsement omitted]

Statement of Objections

1. The ordering paragraph in the proposed judgment should be amended by inserting after the words "set aside" in line 8 the words "insofar as they prescribe new divisions".

2. The following additional ordering paragraph should be included in the judgment as the second ordering paragraph thereof:

> It Is Further Ordered and Adjudged (1) that the effectiveness of the first ordering paragraph of this judgment is hereby stayed for the period of sixty (60) days from the date of this judgment, and if a notice or notices of appeal to the Supreme Court are filed within such period, then the stay shall continue until final disposition or termination of such appeal or appeals; and (2) that during the aforesaid period or periods the Judgment for Interlocutory Injunction and the Judgment for Interlocutory Injunction on Supplemental Complaint and on Amended Complaint shall continue in full force and effect.

[fol. 2139] 3. The following additional ordering paragraph should be included in the judgment as the third ordering paragraph thereof:

> It Is Further Ordered and Adjudged that this Court hereby retains jurisdiction to require such resettlements of divisions of revenue from Transcontinental freight rates as may be just and equitable in the event of any further decision or order of the Interstate Commerce Commission upon remand for further proceedings.

Grounds of Objections

The grounds of objection will be discussed in the order of the objections as stated above.

Plaintiffs' Suggested Ordering Paragraph

Lines 8-11 of the plaintiffs' suggested ordering paragraph are adapted from lines 18-20 of the Court's opinion, but the language in the opinion must be read in the context of the entire opinion. As we read the opinion of this Court, it deals with the prescription of "new divisions" by the Commission. The quoted words appear in the first paragraph and throughout the opinion. There was no real dispute before this Court with respect to the findings of the Commission which condemned the present divisions as unjust, unreasonable and unlawful.

In order to make the form of the judgment conform to the opinion when read in its entirety, the orders of the Commission should not be set aside insofar as they relate to the present long outdated divisions. The governing statute specifically provides that an order of the Commission may be set aside "in whole or in part" (28 U.S.C.A. 1336), and, under the opinion of this Court, the judgment [fol. 2140] should be limited to the parts of the Commission's orders which the Court found unlawful.

Railroad Defendants' Suggested Second Ordering Paragraph

In reviewing orders of the Commission the equitable jurisdiction of this Court includes all powers necessary to protect and enforce the rights and obligations of the parties arising in the course of or by reason of the litigation. *Baltimore & Ohio R. Co.* v. *United States,* 279 U.S. 781, 785-86 (1929); *Ford Co.* v. *National Labor Relation Board,* 305 U.S. 364, 373 (1939). This Court recognized this principle when it imposed carefully worked-out protective conditions in the interlocutory injunctions entered in this case.*

* After the entry of the first interlocutory injunction, the Commission, under date of November 27, 1963, issued its Accounting Series Circular No. 134, which requires the participating railroads

The first additional ordering paragraph suggested by these railroad defendants has two purposes: (1) to provide a concurrent stay of the effectiveness of the first ordering paragraph during the period provided by law for the taking of an appeal and, if appeal is taken, the continuation of the stay until the final disposition or [fol. 2141] termination of the appeal in the Supreme Court; and (2) to preserve the provisions and procedure in the interlocutory injunctions for resettlement in the event the Commission's orders are ultimately upheld on appeal, to the end that if the challenged orders of the Commission are upheld, the plaintiffs would be required to resettle with the other railroads covered by the orders of the Commission on the basis of the divisions prescribed by it, effective as of the effective dates of the Commission's orders. This suggested additional ordering paragraph would preserve the status quo pending appeal, and would prevent the higher divisions prescribed for the railroad defendants from becoming effective and at the same time would protect them in the event they should be successful on appeal. It is clear that this Court has power to enter such an order. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 668-69 (1926).

Counsel for plaintiffs have advised they have no objection in principle to the stay of judgment and continuation of the interlocutory injunctions provided in the first additional ordering paragraph suggested by the railroad defendants, but think such provisions should be incorporated in an order separate from the judgment and made simultaneously therewith. In order that there may be no hiatus,

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to segregate the revenues representing their gains and losses under the assailed orders of the Commission, and not to reflect such amounts in their current revenues as reported to the Commission. This Circular specifically requires the plaintiffs to "set up reserves" sufficient to make any payments which they will have to make to the railroad defendants and other carriers in the event the divisions prescribed by the Commission are upheld.

we submit that the suggested additional ordering paragraph may properly be incorporated in the same judgment as the first ordering paragraph to which it relates.

We believe that it is not only proper but would be better practice to modify the proposed judgment by inserting the additional ordering paragraph and we urge that this be done. In the event the Court sees fit to handle the matter by a separate stay order, we are attaching a form of "Order Staying Judgment" which we propose be signed, dated and entered simultaneously with the judgment.

[fol. 2142]

Railroad Defendants' Suggested Third Ordering Paragraph

Following demonstrated and recognized changes in economic and transportation conditions, the railroad defendants sought by negotiation with plaintiffs to secure divisions more responsive to those conditions than those which had been previously established under earlier and different conditions. Failing to reach agreement upon a more equitable basis, the railroad defendants in 1954 filed their complaints with the Commission and invoked its jurisdiction to prescribe just, reasonable and equitable divisions. After extended hearings, briefs, recommended report of the hearing examiners, and further arguments, both written and oral, the Commission prescribed new divisions which, in general, would increase the revenues of the railroad defendants from transcontinental traffic. The deficiencies which the Court finds to exist in the Commission's orders can be cured as the Court recognizes in its direction that the cause should be remanded to the Commission for further proceedings.

As this Court held in the interlocutory injunctions entered in this case, the difference in revenues under the present divisions and revenues under just, reasonable and equitable divisions is an "indebtedness" which should be protected. It is well settled that, in circumstances such as

those here presented, this Court has the duty as well as the power to fashion a judgment which will protect the rights and interests of all parties pending the ultimate determination of this controversy over new divisions. *Morgan* v. *United States,* 298 U.S. 468 (1936), *Morgan* v. *United States,* 304 U.S. 1 (1938), *United States* v. *Morgan,* 307 U.S. 183 (1939); *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301 (1935); *Inland Steel Co.* v. *United States,* 306 U.S. 153 (1939); *Addison* v. *Holly Hill Co.,* 322 U.S. [fol. 2143] 607 (1944). The third ordering paragraph suggested by the railroad defendants reflects this duty.

The cases cited above show that an agency reviewing court possesses the basic power to protect any fund, and presumably any "debt", which may arise out of or during the course of litigation. Any lack of power in the administrative agency to make a retroactive order is irrelevant to the power of a court of equity to protect the rights and interests of parties before it.

The guiding principles in such a situation were well stated in *Morgan* v. *United States,* 307 U.S. 183 (1939) at pages 190-91:

> "In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for rec-

ognition as an ameliorating system of justice;[2] neither can rightly be regarded by the other as an alien in- [fol. 2144] truder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373; *Inland Steel Co.* v. *United States,* 306 U.S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

The *Atlantic* case (295 U.S. 301) stands for the proposition that an agency order, faulty for lack of findings, is not a complete dead-letter, but rather retains some vitality even after being set aside. At page 314 the Supreme Court held that the "blunders" of the administrative agency "in drawing up its findings" should not be charged against the carrier, and that when they were corrected "the verities of the transaction are revealed as they were from the beginning."

Discussing *Atlantic,* Justice Stone in *Morgan III* (307 U.S. 183), stated in part at pages 195-96:

"Upon further proceedings before the Commission it made a second order, upon proper findings of discrimination, establishing the rate as before. The final result of the litigation was that the railroads were [fol. 2145] permitted to collect and retain the higher rates for a period during which there was no lawful

[2] See Y.B. 22 Ed. IV Mich. pl. 21; *Heath* v. *Rydley,* (1614) Cro. Jac. 335; 1 Holdsworth, History of English Law, 459-465.

order of the Commission superseding the state commission rates. There, as here, the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. *Ewell* v. *Daggs,* 108 U.S. 143, 148, 149; *Weeks* v. *Bridgman,* 159 U.S. 541, 547, *Toy Toy* v. *Hopkins,* 212 U.S. 542, 548. Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action. *Atlantic Coast Line R. Co.* v. *Florida, supra,* 312-313, 317; *New York Edison Co.* v. *Maltbie,* 244 App. Div. 436; 279 N.Y.S. 949; *Brooklyn Union Gas Co.* v. *Maltbie,* 245 App. Div. 74; 281 N.Y.S. 233."

Thereafter, in *Addison* v. *Holly Hill Co.,* 322 U.S. 607 (1944), the Supreme Court extended the doctrine with respect to the power of agency reviewing courts over funds [fol. 2146] under control to cover situations where there had been no actual payment into the court. At page 620 the Court observed:

"The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative re-

sourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law."

Referring to *Morgan III,* the Supreme Court said at page 621:

"If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such construction can be made of the import of our decision in *General American Tank Car Corp.* v. *Terminal Co.,* 308 U.S. 422."

After reviewing the *General American* case, the Court declared at page 622 that retroactive relief could be granted by a court of equity with the aid of the administrative agency:

"In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity in the evolution of more just results than the hardened common law afforded, has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases, such as those already referred to and in this, it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action any more than courts have found it difficult to sanction legislative ratification of acts orig- [fol. 2147] inally unlawful, *United States* v. *Heinszen & Co.,* 206 U.S. 370; *Tiaco* v. *Forbes,* 228 U.S. 549; *Graham & Foster* v. *Goodcell,* 282 U.S. 409, *Hirabayashi* v. *United States,* 320 U.S. 81, 91, or retroactively to give prior legislation new scope. *Paramino Lumber Co.* v. *Marshall,* 309 U.S. 370. And in habeas corpus proceedings, even though a petitioner

was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made. *Mahler* v. *Eby*, 264 U.S. 32; *Tod* v. *Waldman*, 266 U.S. 113."

A significant discussion of the pertinent principles appears in the dissenting opinion of Mr. Justice Frankfurter in *Chicago, M. St. P. & P. R. Co.* v. *Illinois*, 356 U.S. 906 (1958), in which three Justices concurred. As this opinion indicates, the majority's decision (not covered by an opinion) appears to have been influenced by the fact that the carrier which held excess fares had consented to a distribution thereof if the administrative order were set aside and thereby waived its right to retroactive relief in the event of a remand of the cause to the Interstate Commerce Commission. At page 907 Mr. Justice Frankfurter said:

"It can hardly be denied * * * that if after further proceedings before the Commission a valid order is entered to the same effect as the earlier order set aside, petitioner (carrier) will be entitled to the impounded funds."

The foregoing authorities fully support the inclusion in the judgment of this Court of the third ordering paragraph [fol. 2148] suggested by the railroad defendants.

February 3rd, 1965.

Respectfully submitted,

Joseph F. Eshelman, 1600 Three Penn Center Plaza, Philadelphia, Pa. 19102;
Edward A. Kaier, 1138 Six Penn Center Plaza, Philadelphia, Pa. 19103;
Kenneth H. Lundmark, 466 Lexington Ave., New York, N. Y. 10017;
Thelen, Marrin, Johnson & Bridges, Gordon Johnson, James W. Baldwin, 811 West Seventh Street, Suite 1005, Los Angeles, California 90017, By James W. Baldwin,
Attorneys for Intervening Defendants, The Baltimore and Ohio Railroad Co. and The Akron, Canton & Youngstown Railroad Co., et al.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago, Illinois 60603;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, Daniel J. Sweeney, One North LaSalle Street, Suite 330, Chicago, Illinois 60602;

Nye F. Morehouse, 400 West Madison Street, Suite 836, Chicago, Illinois 60606;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles, California 90017, By Frank R. Johnston,

Attorneys for Intervening Defendants, Chicago and North Western Railway Co., et al.

[fol. 2149] Raymond K. Merrill, 888 Union Station Building, 516 W. Jackson Boulevard, Chicago, Illinois 60606;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Boulevard, Los Angeles, California 90017, By Joseph H. Cummins,

Attorneys for Intervening Defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 2150] Proof of Service by Mail (omitted in printing).

[fol. 2153]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

MEMORANDUM IN OPPOSITION TO OBJECTIONS OF INTERVENING DEFENDANTS TO FORM OF JUDGMENT—February 8, 1965

On January 29, 1965, plaintiffs submitted a Judgment as ordered by the Court in its "Memorandum Opinion and Order Re Preparation of Judgment" dated January 25, 1965 (pp. 23-24).

Defendants (the United States and the Interstate Commerce Commission) have not filed any objection to the [fol. 2154] Judgment. Objections have been submitted by intervening defendants Baltimore & Ohio R. Co. et al. and Chicago & North Western R. Co. et al., accompanied by a memorandum setting forth the grounds for such objections.

Before discussing intervening defendants' specific objections, it is significant to note that the judgment submitted by plaintiffs is, in all essential respects, the same as that entered by the Colorado District Court pursuant to its opinion in *Atchison, T. & S. F. Ry. Co.* v. *United*

[File endorsement omitted]

States, 225 F.Supp. 584 (D. Colo. 1964), cited in the Memorandum Opinion of this Court (Opinion pp. 14-19).*

I. Plaintiffs Have No Objection to a Stay Pending Appeal.

Intervening defendants urge that the Court's Judgment in this case be stayed to protect their position in the event they decide to appeal the case to the Supreme Court (Objections pp. 3-4). Plaintiffs do not object to such a stay, and have no objection to the form of "Order Staying Judgment" submitted as a separate document by intervening defendants. We think this stay should be entered as a separate order when the Judgment is entered and inter-
[fol. 2155] vening defendants appear to have no real objection to this procedure (Objections p. 4, lines 27-32).**

II. The Judgment Relates to the Entire Action of the Commission and Is Not Limited to the Prescription of New Divisions.

There is no justification for the proposal of intervening defendants that the Judgment of this Court setting aside the Commission's orders be limited by the phrase "insofar as they prescribe new divisions." As intervening defendants admit (Objections p. 2, lines 17-18), plaintiffs' proposed ordering paragraph is taken directly from this Court's opinion (p. 23, lines 14-19). Intervening defen-

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* The full text of the order of the Colorado District Court, dated January 31, 1964, is as follows:

> "Ordered that the Order of the Interstate Commerce Commission entered on May 7, 1962, in its Docket No. 31627, be set aside and the cause is remanded to the Commission for further proceedings consistent with the views expressed in the Opinion of this Court."

** In expressing this agreement with the substance of the request for a stay, however, we are not in any way acquiescing in the random and erroneous comments of the intervening defendants with respect to the Commission's accounting "Circular" dated November 27, 1963 (Objections p. 3, lines 22-32).

dants nevertheless object to this ordering paragraph, asserting that it was taken out of context, on the theory that the Court's opinion deals only "with the prescription of 'new divisions' by the Commission" (Objections p. 2, lines 20-21). This objection is without merit.

The controversy before this Court centered on the statutory requirements for valid Commission action under Section 15(6) of the Interstate Commerce Act, and specifically on the requirement that the Commission give due consideration to the amount of revenue required to pay the carriers' [fol. 2156] operating expenses, taxes and a fair return on the property they devote to railway transportation. The Memorandum Opinion concludes that the Commission's findings and conclusions were insufficient under Section 8(b) of the Administrative Procedure Act to resolve the material issues raised with respect to revenue needs and to disclose that the requirements of Section 15(6) had been met (Opinion pp. 13, 22). This holding vitiates the Commission's determination with respect to the lawfulness of existing divisions precisely as it vitiates the prescription of new divisions.

Section 15(6) provides that the Commission shall *prescribe* new divisions if it *determines* that the existing divisions are or will be unjust, unreasonable or inequitable. Section 15(6) further provides that "In so prescribing and and determining the divisions . . . the Commission shall give due consideration" to enumerated requirements. The same requirements obviously and necessarily apply to the determination of the lawfulness of existing divisions as to the prescription of new divisions. It would be unreasonable to construe the requirements of Section 15(6) as governing only the prescription of new divisions, thus leaving no standards at all to govern the Commission's determination of the lawfulness of existing divisions. As the Court stated in its Memorandum Opinion (p. 18):

> ". . . It is reasonable to assume that the same rules [that apply in the determination of the unlaw-

fulness of the present division] would apply in determining the fairness of new divisions."

[fol. 2157] The Court having held that the Commission must find the amount of revenue required by the respective carriers in applying the requirements of Section 15(6) (Opinion pp. 13, 22), and that the findings must show that "the Commission has considered the revenue needs of the carriers for *all* transportation services" (Opinion p. 23), the making of these findings is as essential to the determination of the fairness of existing divisions as it is to the prescription of new divisions.

It is also plain from the face of the Commission's reports that these legal errors in the Commission's treatment of revenue needs are crucial to the Commission's determination with respect to the lawfulness of existing divisions. In erroneously rejecting plaintiffs' reliance upon revenue needs as showing that they are entitled to increases in their divisions, the Commission simultaneously considered and rejected the claim that the evidence of revenue needs, properly stated and evaluated, would justify the continuation of the existing divisions (PR 122):

> "In our determination herein we have received and considered evidence in relation to these [revenue needs] as well as all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the beneficial and alleged detrimental aspects of the prescribed divisions. We reject petitioning defendants' contention concerning their greater costs and revenue needs as unsupported by evidence of record. In our opinion there is no substantial evidence which [fol. 2158] would warrant a finding either that they are entitled to an increase in their divisions *or that the present divisions are fair and should be maintained.*" (Emphasis supplied)

This Court having held that the Commission's treatment of the revenue needs issue did not satisfy the statutory requirements, the Commission's conclusions based upon revenue needs, both with respect to the present divisions and the prescribed divisions, are inherently and avowedly a part of the same orders of the Commission which this Court has held should be set aside.

Intervening defendants' claim that "There was no real dispute before this Court with respect to the findings of the Commission which condemned the present divisions as unjust, unreasonable and unlawful" (Objections p. 2) is misleading. Before the Commission, each of the parties contended that the existing divisions are unlawful, in the sense that they fail to accord that party a larger share of the transcontinental revenues. Before this Court, the claims made by plaintiffs bear equally upon the Commission's finding that the existing divisions are unlawful because they accord the Mountain-Pacific lines too high a share of transcontinental revenues and upon the Commission's conclusion that the Eastern and Midwestern lines should receive larger divisions. In setting aside the Commission's orders, the Court's Memorandum Opinion leaves the Commission free to enter any further order lawfully supported by findings and evidence, whether such order increases or reduces the present divisions of any party, or leaves the present divisions in effect. The limiting language proposed by intervening defendants is an unjustified [fol. 2159] effort to have the Judgment of this Court restrict the scope of the proceedings on remand by limiting the Commission's statutory discretion to determine whether the present divisions are unlawful in light of the findings to be made in compliance with the Memorandum Opinion.

Moreover, and in any event, intervening defendants' proposed limitation of the application of the Judgment to new divisions is unsound in view of the fact that this Court found it "unnecessary to discuss issues 20 to 30" (Opinion p. 23, lines 8-9). These issues deal with cost of service,

which is unquestionably related to the determination of the lawfulness of existing divisions. It is manifest that the Court did not intend to *affirm* the Commission's treatment of the question of relative cost of service without passing upon issues 20 to 30, and intervening defendants' effort to accomplish such a result by indirection is therefore plainly inconsistent with the Memorandum Opinion of this Court. It was not necessary for the Court to reach issues 20 to 30 because the Court's disposition of previous issues compelled the conclusion that the Commission's orders under review should be set aside in their entirety.

The Court's direction for Judgment negatives any intention to render a piecemeal decision, and the failure of defendant Interstate Commerce Commission to join intervening defendants' objection makes it plain that the Commission does not interpret the Memorandum Opinion as having failed to set aside any such piece of its orders. The Judgment submitted by the plaintiffs completely disposes of the controversy before the Court, and it should be entered as submitted.

[fol. 2160]

III. It Is Neither Necessary Nor Proper for the Court to Retain Jurisdiction to Require Resettlement of Divisions in Light of Any Further Order of the Commission.

The proposal that the Judgment include a paragraph retaining jurisdiction is *not* related to the protection to which intervening defendants are entitled in the event this Court's Judgment were reversed on appeal. The stay order to which plaintiffs consent (p. 2, *supra*) keeps in effect this Court's Judgments for Interlocutory Injunction containing "carefully worked-out protective conditions" (Objections, p. 3). In the event the Supreme Court should reverse the Judgment of this Court, and the Commission's orders should not be set aside, those protective conditions would become operative and this Court would have juris-

diction, under the express terms of the Judgments for Interlocutory Injunction, to enforce those conditions.

Intervening defendants' present proposal does not relate to the orders of the Commission which are before this Court for review. The proposal is that the Judgment of this Court contain a paragraph under which, even if that Judgment is affirmed on appeal, or is not appealed, this Court would retain jurisdiction to require resettlement of divisions in the event of "any further decision or order of the Interstate Commerce Commission upon remand for further proceedings" (Objections p. 2).

By this proposal, intervening defendants ask this Court [fol. 2161] to decide at this time, with only summary briefing of the issue, the question of the existence of jurisdiction to require resettlements in light of any further order of the Commission. Intervening defendants do not claim to find any support for their proposal in this Court's Memorandum Opinion. Indeed, a closing paragraph of that Opinion makes it plain that there is no need for any consideration of further equitable relief at this time (p. 23, lines 20-24):

> "Any order which might hereafter be made by the Commission in the proceedings under review or new proceedings would be subject to challenge and to injunctive relief if the Commission failed to act in accord with the statutory requirements. *Cantlay & Tanzola* vs. *United States,* 115 F.Supp. 72 at 84 (D.C. S.C. Cal. 1953), and 28 U.S.C., Sections 1336, 2284, 2324 and 2325."

No purpose is served by speculating at this time on the question of whether equity jurisdiction of the kind intervening defendants ask this Court to retain would even exist, or if such jurisdiction exists, whether the equities of the case would call for its exercise. All questions of the extent and proper exercise of equity jurisdiction upon the entry

of any further order of the Commission should be considered following the entry of any such order.

The inappropriateness of premature court action on statutory and jurisdictional questions which might never actually need to be decided was emphasized by the Supreme Court in *Lehigh Valley Cooperative* v. *United States*, 370 [fol. 2162] U.S. 76 (1962). In that case, the Supreme Court expressly refused to engage in speculation as to the possible consequences of any new order of the Secretary of Agriculture replacing the order that had just been held invalid, saying (370 U.S. at 99):

> "The Secretary of course remains free to protect, in any manner consistent with the provisions of the statute, the 'blend price' in this or any other marketing area against economic consequences resulting from the introduction of outside milk. We do not now decide whether or not any new regulation directed to that end could be made to apply retrospectively, or whether, if it could be validly so applied, the presently impounded funds could be resorted to *pro tanto* in its effectuation. Cf. *Morgan* v. *United States*, 307 U.S. 183. 'What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.' *Morgan* v. *United States*, 304 U.S. 23, 26."

As shown in the foregoing quotation from *Lehigh Valley*, the Supreme Court's opinion in the very *Morgan* cases upon which intervening defendants rely (Objections p. 5) condemns their proposal that this Court now decide that the Court has jurisdiction to enforce a retroactive resettlement of divisions. At the stage of the *Morgan* litigation at which the administrative order was set aside, the Supreme Court ruled that questions respecting further proceedings "are not matters which we should attempt to

[fol. 2163] forecast or hypothetically to decide" (304 U.S. at 26).

Because the whole question of whether this Court possesses, and thus can "retain," jurisdiction to compel a retroactive resettlement of divisions is speculative, we do not believe that the Court desires a brief discussing in detail the cases bearing on the merits of this hypothetical question of equity jurisdiction at this time. We do note in passing that we do not believe that such jurisdiction would exist here and that none of the cases cited by intervening defendants bears any resemblance to the present case. For example, the opinion upon which intervening defendants primarily rely, *United States* v. *Morgan*, 307 U.S. 183 (1939), is inapposite on its face. That opinion emphasized that courts should avoid conflict with administrative agencies (as quoted in Objections, p. 6). No such problem is before this Court where the administrative agency and its statutory representative, the Interstate Commerce Commission and the United States, have filed no objection to the Judgment submitted by plaintiffs.*

[fol. 2164] If, contrary to the reasons set forth above, this Court wishes to consider at this time whether there exists any equity jurisdiction of the kind which intervening defendants ask the Court to retain, plaintiffs respectfully request the opportunity to file a full brief, analyzing the case law on the subject, and to be heard on this issue. However, the question is hypothetical at this stage, and the Supreme Court decisions in *Morgan* itself and *Lehigh Valley, supra,* consistent with the Memorandum Opinion of this Court, make it plain that a District Court should not cross this bridge until it is reached.

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* The *Morgan* case turned upon "the meaning and application of the provisions of the Packers and Stockyards Act" (307 U.S. at 188), under which retroactive relief in the form of reparations was expressly made available (307 U.S. at 189, 193, 197). Decisions dealing with the division of railroad revenues condemn the retroactive application of Commission orders. *Brimstone R. Co.* v. *United States*, 276 U.S. 104, 121-122 (1928); *United States* v. *Baltimore & Ohio R. Co.*, 284 U.S. 195 (1931).

Conclusion

The Judgment submitted by plaintiffs is in full conformity with the Memorandum Opinion of this Court and should be entered without the improper and inappropriate additions requested by the intervening defendants.

Dated: February 8, 1965.

Respectfully submitted,

O'Melveny & Myers, Pierce Works, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Attorneys for Plaintiffs.

[fol. 2165] Affidavit of Service (omitted in printing).

[fol. 2168]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JUDGMENT—Filed and Entered February 18, 1965

This action came on for trial and hearing before the Court, Honorable Stanley N. Barnes, United States Cir-

[File endorsement omitted]

cuit Judge, Honorable William C. Mathes, United States District Judge, and Honorable E. Avery Crary, United States District Judge, presiding, and the issues having been duly tried, heard and determined, a Memorandum Opinion having been duly filed and the Court having ordered that said Opinion "shall serve as Findings of Fact and Conclusions of Law to the extent required by Rule 52a, F.R.Civ.P.", Now, Therefore, in accordance with said Findings of Fact and Conclusions of Law,

[fol. 2169] It Is Ordered and Adjudged that the Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order of that Commission dated June 20, 1963, and also the Order of that Commission dated December 31, 1963 (each and all as entered by the Commission in the cause under its Docket No. 31503 and Sub Nos., *Akron, Canton & Youngstown R. Co. et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*), and each and all of said Orders, be and the same are hereby set aside and that said cause be and the same is hereby remanded to the Commission for further proceedings consistent with the said Memorandum Opinion of this Court.

Dated: Feb. 17, 1965.

Stanley N. Barnes, United States Circuit Judge,
Wm. C. Mathes, United States District Judge,
E. Avery Crary, United States District Judge.

[fol. 2170] Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014.

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101.

Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.

Approved as to form, January 29, 1965. By Dean C. Dunlavey.

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles, California 90014.

W. A. Thie, Barrett Building, Denison, Texas.

M. E. Clinton, 204 M-K-T Building, 701 Commerce Street, Dallas, Texas 75202.

John E. McCullough, 906 Olive Street, St. Louis, Missouri 63101.

Attorneys for Intervening Plaintiff Missouri-Kansas-Texas Railroad Company.

Approved as to form, January 29, 1965. By Dean C. Dunlavey.

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco, California.

Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California.

Approved as to form, January 28, 1965. By Cyril M. Saroyan by DMW.

[fol. 2171] Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon.

Joseph Besnah, 336 E. Hillcrest, Suite 519, Inglewood, California.

Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.

Received copy January 28, 1965, 2:30 P. M. By Joseph Besnah.

Manuel L. Real, United States Post Office and Courthouse, Los Angeles, California 90012.

Attorney for Defendants The United States of America and Interstate Commerce Commission.

Received copy January 28, 1965, 4:40 P. M. By James R. Dooley, Asst. U.S. Atty.

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia, Pa.

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California.

Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.

Received copy January 29, 1965, 1:15 P. M. By James W. Baldwin.

[fol. 2172] Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago, Illinois 60603.

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago, Illinois 60602.

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago, Illinois 60606.

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles, California 90017.

Attorneys for Intervening Defendants Chicago & North Western Railway Co., et al.

Received copy January 28, 1965, 5:05 P. M. By George W. Tackabury.

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago, Illinois 60606.

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles, California 90017.

Attorneys for Intervening Defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Received copy January 29, 1965, 10:05 A. M. By M. A. Massing for Joseph H. Cummins.

[fol. 2173]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA et al., Defendants.

ORDER STAYING JUDGMENT—Filed and Entered February 18, 1965

[fol. 2174] It Is Hereby Ordered and Adjudged (1) that the effectiveness of the Judgment signed, dated and entered concurrently herein on this date is hereby stayed for the period of sixty (60) days from said date, and if a notice or notices of appeal to the Supreme Court are filed within such period, then this stay shall continue until final disposition or termination of such appeal or appeals; and (2) that during the aforesaid period or periods the Judgment for Interlocutory Injunction and the Judgment for Interlocutory Injunction on Supplemental Complaint and on Amended Complaint shall continue in full force and effect.

Dated: February 17, 1965.

Stanley N. Barnes, United States Circuit Judge,
Wm. C. Mathes, United States District Judge,
E. Avery Crary, United States District Judge.

[File endorsement omitted]

[fol. 2175]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY ET AL. TO THE SUPREME COURT OF THE UNITED STATES—Filed March 25, 1965

I.

Notice is hereby given that Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and [fol. 2176] Soo Line Railroad Company, intervening defendants, hereby appeal to the Supreme Court of the United States from the final judgment in this action dated February 17, 1965, and entered on February 18, 1965, setting aside the order of the Interstate Commerce Commission dated March 21, 1963, as amended by the order of that Commission dated June 20, 1963, and also the order of

[File endorsement omitted]

that Commission dated December 31, 1963 (each and all as entered by the Commission in the cause under its Docket No. 31503 and Sub Nos., *Akron, Canton & Youngstown R. Co. et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.*), and remanding said cause to said Commission for further proceedings consistent with the memorandum opinion of the District Court.

This appeal is taken pursuant to 28 U.S.C. Sections 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript (1) the portions of the record set forth in the designation made in Section II of the Notice of Appeal filed in this action by The Baltimore and Ohio Railroad Company et al., which designation is hereby adopted and incorporated herein, and (2) this Notice of Appeal of Chicago and North Western Railway Company et al.

III.

The questions presented by this appeal arise out of the opinion and judgment of the District Court in reviewing orders of the Interstate Commerce Commission (hereinafter referred to as "the Commission") prescribing new divisions of joint interterritorial rail freight rates in proceedings on complaints under Sections 1(4) and 15(6) of the Interstate Commerce Act (49 USC 1(4) and 15(6)) involving some 300 railroads, which proceedings were tried and submitted by the parties and decided by the Commis- [fol. 2177] sion as controversies between three contending groups of carriers, namely, Eastern or Official Territory railroads, Midwestern railroads, and Transcontinental or Mountain-Pacific railroads. To a great extent, these questions arise because of the novel interpretation placed by the District Court on Section 15(6) of the Interstate Com-

merce Act. (49 U.S.C. 15(6)). The questions presented are as follows:

1. Whether the Commission was required to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to its consideration of the evidence relating to the revenue required by the carriers concerned to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation; and particularly:

(a) Whether the Commission was required to find, for each of the contending groups of carriers and for each of the individual carriers, the dollar amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation;

(b) Whether the Commission was required to find in terms of dollars the revenue effect of the prescribed divisions upon each of the contending groups of carriers and upon each of the individual carriers; and

(c) Whether the Commission was required to find in terms of dollars the extent to which the prescribed divisions would produce for each of the contending groups of carriers and for each of the individual carriers the revenue found to be required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation.

[fol. 2178] 2. Whether (a) there was any issue properly before the District Court for decision with respect to the sufficiency of the findings of the Commission relating to any of the factors, other than revenue requirements, enumerated in Section 15(6) of the Interstate Commerce Act (49 USC 15(6)), namely, the efficiency with which the carriers concerned are operated, the importance to the public of the transportation services of such carriers, the status

of any particular participating carrier as an originating, intermediate or delivering line, or any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate; and (b) if so, whether the Commission was required to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to such Section 15(6) factors, or any of them.

3. Whether (a) there was any issue properly before the District Court for decision with respect to the necessity for findings of the Commission that the prescribed divisions would be just, reasonable and equitable as to each individual carrier; and (b) if so, whether the Commission was required to state in its reports any findings, conclusions, reasons or bases, beyond those stated therein, with respect to such matter.

4. Whether the District Court erred (a) in stating that there had been no intentional relinquishment of a known right on the part of The Denver and Rio Grande Western Railroad Company, the Missouri-Kansas-Texas Railroad Company or the St. Louis, San Francisco Railway Company, and that none of them waived any right to object to losses resulting to them from the new divisions; and (b) in failing to hold for defendants and intervening defendants in respect to issues explicitly involving said rail- [fol. 2179] roads as set forth in Issues Nos. 5, 8 and 13 of the List of Issues Remaining in Controversy dated October 21, 1964.

5. Whether, as to any issue set forth in the List of Issues Remaining in Controversy dated October 21, 1964, the Commission erred in any respect properly before the District Court for decision.

6. Whether any of the alleged infirmities in the orders of the Commission, or any other alleged errors of the

Commission, were prejudicial to any of the plaintiffs or intervening plaintiffs.

7. Whether the District Court erred in setting aside those portions of the Commission's orders which find that the present divisions are unjust, unreasonable and inequitable.

8. Whether the District Court erred in failing and refusing to retain jurisdiction to require such resettlements of divisions of revenue from Transcontinental freight rates as may be just and equitable in the event of any further decision or order of the Commission upon remand for further proceedings.

Dated, March 25, 1965.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago, Illinois 60603;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago, Illinois 60602;

Nye F. Morehouse, 400 West Madison Street, Suite 826, Chicago, Illinois 60606;

[fol. 2180] Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, Los Angeles, California 90017, By Frank R. Johnston;

Attorneys for Intervening Defendants, Chicago and North Western Railway Co., et al.

Raymond K. Merrill, 888 Union Station Building, Chicago, Illinois 60606;

Welsh & Cummins, Louis M. Welsh, 1204 Statler Center, Los Angeles, California 90017, By Joseph H. Cummins:

Attorneys for Intervening Defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 2181] Proof of Service (omitted in printing).

[fol. 2184]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed April 16, 1965

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled action, appeal to the Supreme Court of the United States from the final judgment dated February 17, 1965, and entered in this action on February 18, 1965. This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

[fol. 2185]

II.

These appellants hereby adopt and incorporate into this Notice of Appeal the designation of record contained in the Notice of Appeal filed in this action by the Baltimore and Ohio Railroad Company, et al., which designated the

[File endorsement omitted]

portions of the record to be prepared by the Clerk of this Court for transmission to the Clerk of the Supreme Court of the United States, but request the Clerk of this Court to include in said transcript the following additional document:

This notice of appeal.

III.

The following questions are presented by this appeal:

1. Whether in administrative proceedings involving divisions of joint freight rates of over 300 railroads which were tried, submitted, determined and disposed of on a group basis, the District Court erred in holding that the Commission is required to make affirmative findings which disclose that all factors and requirements of Section 15(6) of the Interstate Commerce Act have been determined, considered and met not only with respect to the groups of roads involved but also with respect to each individual carrier affected in said groups?

2. Whether in applying Section 15(6) of the Interstate Commerce Act in the administrative proceedings in question, the Commission gave due consideration and made adequate findings to disclose the reasons or bases for its determination as to "the amount of revenue required" by the carriers concerned "to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation"?

[fol. 2186] 3. Whether the District Court erred in holding that the statutory mandate of the "revenue needs" clause of Section 15(6) of the Interstate Commerce Act requires, as a condition precedent to a valid prescription of new divisions, that the Commission affirmatively find, in terms of dollars, for each of the contending groups of carriers and for each individual carrier in said groups, "the amount of revenue required to pay their respectiv

operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation"?

4. Whether the District Court erred in holding that the provisions of Section 15(6) of the Interstate Commerce Act and Section 8(b) of the Administrative Procedure Act require, as a condition precedent to the valid prescription of new divisions, that the Commission make affirmative findings, in terms of dollars, (a) as to the financial or revenue effect of the new prescribed divisions upon each of the contending groups of carriers and each of the individual carriers in said groups; and (b) the extent to which the new prescribed divisions would produce for each contending group and each individual carrier the amount of revenue found to be required "to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation"?

5. Whether the Commission's specific findings rejecting the claims of the Denver Rio Grande, the Missouri-Kansas-Texas, and the St. Louis-San Francisco Railroads were adequate and supported by substantial evidence and, if so, whether the District Court erred in holding that those railroads did not intentionally relinquish or waive any of their rights to object to the losses resulting from the new prescribed divisions?

[fol. 2187] 6. Whether the District Court erred in holding that Section 15(6) requires the Commission to make findings, in addition to those it did make, which show that due consideration has been given to the revenue needs of the carriers concerned from *all* transportation services, including needs represented by passenger deficits?

7. Whether the District Court erred in failing to determine that the ultimate findings and conclusions of the Commission with respect to the relative costs of the contending groups of carriers were based upon adequate sub-

sidiary findings and supported by substantial evidence in the record considered as a whole?

Dated April 16, 1965.

William H. Orrick, Jr., Assistant Attorney General:

John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530;

Emanuel L. Real, United States Attorney, Los Angeles, California;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423;

Attorneys for the Interstate Commerce Commission.

[fol. 2188] Proof of Service (omitted in printing).

[fol. 2191]

SUPREME COURT OF THE UNITED STATES

Nos. 159 & 576—October Term, 1965

CHICAGO AND NORTH WESTERN RAILWAY COMPANY et al., Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.,

and

UNITED STATES, et al., Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO. et al.

ORDER NOTING PROBABLE JURISDICTION—April 4, 1966

Appeals from the United States District Court for the Southern District of California.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of three hours is allotted for oral argument.